No. 08-_____ 08-981 JAN 30 2009

In The
Supreme Court of the United States

FATHI Y.M. YUSUF, WALEED M. HAMED, WAHEED M. HAMED, MAHER F. YUSUF, NEJEH F. YUSUF, and UNITED CORPORATION d/b/a PLAZA EXTRA,

Petitioners,

v.

UNITED STATES and GOVERNMENT OF THE VIRGIN ISLANDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To be "proceeds" of unlawful activity under the money laundering statute, 18 U.S.C. § 1956(a), must funds constitute "profits" derived from the "gross proceeds" of criminal conduct after payment of expenses, or does "proceeds" in the sense of "profits" also encompass an amount of money, in whatever form, equal to the liability avoided through nonpayment of taxes?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (the five individual petitioners, the corporate petitioner, and the two respondent governments, the United States and the Territory of the United States Virgin Islands). A seventh defendant, Isam M. Yousuf, is believed to be outside the jurisdiction and has not made an appearance in either of the courts below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Fathi Yusuf, Waleed Hamed, Waheed Hamed, Maher Yusuf, Nejeh Yusuf, and United Corporation respectfully petition this Court jointly for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit reversing an order which dismissed the money laundering counts in a pending indictment against them.

OPINIONS BELOW

The Third Circuit's precedential opinion (per Roth, J., with Smith & Nygaard, JJ.) was filed on June 17, 2008, and amended July 21, 2008; see *United States v. Yusuf*, 536 F.3d 178; Appx. 1. The opinion and order of the United States District Court for the Virgin Islands (Finch, J.), filed February 13, 2007, are not published. They are reprinted in the Appendix, at 27-47. The district court's memorandum on denial of reconsideration, filed June 25, 2007, is Appendix 48-51.

An earlier opinion of the district court granting a suppression motion is available at 2005 WL 1592928 (D.V.I. 2005). The opinion of the Third Circuit reversing that order is published at 461 F.3d 374 (3d Cir. 2006). *See also* 199 Fed. Appx. 127 (3d Cir. 2006) (opinion remanding for hearing on defendants' motion for release of funds from preliminary restraint). The

latter three opinions are not included in the Appendix, as they do not underlie the instant petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit reversing the order of the United States District Court for the Virgin Islands was filed and entered on June 17, 2008, and amended July 21, 2008. Appx. 1. A petition for rehearing was filed, but was denied on September 2, 2008. Appx. 52. On November 25, 2008, under No. 08A461, Justice Souter extended until January 30, 2009, the date for filing this petition. The petition is being filed by postmark on or before that date. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTES INVOLVED

The pertinent subsection of **the Money Laundering Control Act**, which is **Title I, Subtitle H, of the Anti-Drug Abuse Act of 1986**, Pub.L. No. 99-570, § 1352, 100 Stat. 3207-18, provides:

> (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer, a monetary instrument or funds from a place in the

United States to or through a place outside the United States . . . –

* * *

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;. . . .

* * *

shall be sentenced to a fine . . . or imprisonment . . . or both.

18 U.S.C. § 1956(a)(2)(B)(i).

The definitions in § 1956 of title 18 provide, in part:

(c) As used in this section –

* * *

(7) the term 'specific unlawful activity' means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable

> under subchapter 11 of chapter 53 of title 31. . . .

The incorporated list of criminal activities in 18 U.S.C. § 1961, the Racketeer Influenced and Corrupt Organizations ("RICO") Act, in turn, includes "(B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud). . . ." 18 U.S.C. § 1961(1). No tax offenses are included in § 1956(c)(7) or listed in § 1961(1).

STATEMENT OF THE CASE

This petition arises out of a criminal tax prosecution which is pending in the United States District Court for the Virgin Islands. The district court dismissed the money laundering counts (and related forfeiture averments) from the indictment, but the Third Circuit reversed.

a. Procedural History

Six members of the Yusuf family and the corporation through which they own and operate three grocery stores were charged in the federal court in the Virgin Islands in a 78-count superseding indictment with various territorial and federal tax offenses, with mail fraud consisting of mailing false tax returns, and with charges of "international money laundering" predicated on the retained "proceeds" of the mail fraud. Thus, violations of Virgin Islands tax

law are charged both under 18 U.S.C. § 1341 as mail fraud and under a Virgin Islands statute, 33 V.I.C. § 1525(2) (false returns). The money laundering is charged under 18 U.S.C. § 1956(a)(2)(B)(i) – the international transfer of funds representing the "proceeds" of the mail fraud, with intent to conceal or disguise their location or ownership.

The indictment further charges petitioners with causing the filing of false federal and local tax returns (26 U.S.C. § 7206(2); 33 V.I.C. § 1525(2)) and structuring of currency transactions (31 U.S.C. § 5324). The indictment also charges three of the individual petitioners and United Corporation with racketeering under territorial law (14 V.I.C. § 605(a)) – the "enterprise" being petitioner United and other corporations, and the pattern of unlawful activity being the other offenses charged in the indictment. Finally, the indictment includes four separate conspiracy counts – under 18 U.S.C. § 371 (conspiracy to commit mail fraud and structuring), § 1956(h) (money laundering conspiracy); 14 V.I.C. § 605(d) (conspiracy to conduct racketeering enterprise); and 33 V.I.C. § 1522 (conspiracy to evade territorial taxes). Petitioner Nejeh Yusuf is also charged in one count of endeavoring to obstruct justice, for allegedly giving false testimony at a pretrial hearing (18 U.S.C. § 1503). Finally, the indictment also includes criminal forfeiture averments under 18 U.S.C. § 982 and 14 V.I.C. § 606.

On motion of the defendants, the district court dismissed the counts charging money laundering,

money laundering conspiracy, and the related criminal forfeitures. Appx. 45. The district court denied the government's motion to reconsider, Appx. 47, but the Third Circuit sustained the government's interlocutory appeal and reversed. Appx. 1-26. The Third Circuit premised its ruling on this Court's recent decision in *United States v. Santos*, 553 U.S. — , 128 S.Ct. 2020 (2008). Under *Santos*, the term "proceeds" as used in 18 U.S.C. § 1956, the principal federal money laundering statute, means "profits" not "gross proceeds," at least in the absence of specific legislative history showing otherwise with respect to "proceeds" of a particular form of underlying "specified unlawful activity." The court below thus recognized that *Santos* overruled prior Third Circuit precedent in that regard. Appx. 9, 16; 536 F.3d at 186 n.12. However, the court rejected the appellees' (now petitioners') argument that under *Santos* "profits" in this sense always means "net proceeds," that is, profits retained, after expenses, from the gross proceeds of criminal activity. Appx. 12-24; 536 F.3d at 186-90.

A petition for rehearing en banc was denied. Appx. 52. This petition follows.

b. Statement of Facts

Because this case arises in a pretrial setting, no "facts" have been established. The seven defendants are identified in the Third Circuit's decision in the following terms:

> (1) United Corporation, a family-owned business located in the Virgin Islands that operates a chain of three Plaza Extra Supermarket stores in St. Thomas and St. Croix; (2) Fathi Yusuf, the primary shareholder of United; (3) Maher 'Mike' Yusuf, Fathi's son, who is a part-owner of United and manager of one of the Plaza Extra stores; (4) Waheed 'Willie' Hamed, Fathi's nephew, who manages the second Plaza Extra store; (5) Waleed 'Wally' Hamed, Fathi's nephew and Waheed's brother, who manages the third Plaza Extra store; (6) Isam 'Sam' Yousef, Fathi's nephew, who is a resident of St. Maarten, Netherlands Antilles, and owns and operates a retail furniture and appliances store; and (7) Nejeh Fathi Yusuf, Fathi's son, who is an owner and employee of United and who participated in the operation of the Plaza Extra stores.

Appx. 3; 536 F.3d at 181. The government's factual theory of the case was summarized by the court below, from the allegations of the superseding indictment, as follows:

> Because defendant United conducts business through its Virgin Islands supermarkets, it is required to comply with statutorily-mandated monthly reporting of gross receipts and payment of tax on those receipts. Section 43(a), Title 33, of the Virgin Islands Code provides, in pertinent part, that '[e]very individual and every firm, corporation, and other association doing business in the Virgin Islands shall *report their gross receipts* and *pay a tax of four percent (4%) on the gross receipts* of such business.' 33 V.I.C.

> § 43(a) (emphasis added). Section 44(c) provides for monthly returns and payments and states that '[t]he returns and payments required by this subsection shall be due within 30 calendar days following the last day of the calendar month concerned.' 33 V.I.C. § 44(c). Thus, taxes imposed on United's gross sales receipts from its supermarkets during a particular month were due and payable on the last day of the following month.
>
> . . . [The] defendants allegedly conspired to avoid reporting $60,000,000 of the supermarkets' gross receipts on United's Virgin Islands gross receipts monthly tax returns and failed to pay the Virgin Islands government the 4% tax that United owed on those unreported gross receipts. The . . . defendants allegedly engaged in various efforts to disguise and conceal the illegal scheme and its proceeds. Such efforts included allegedly depositing [the tax savings] into bank accounts, controlled by defendants, outside of the United States.

Appx. 3-5; 536 F.3d at 181-82 (footnotes omitted). The claimed facts of the alleged money laundering activity are not described in the opinion, and the indictment says only this:

> On or about the dates listed in each count below, in the District of the Virgin Islands and elsewhere, the [defendants] transported and transferred, and attempted to transport and transfer, monetary instruments and funds in amounts described below from a place in the

> United States, specifically the United States Virgin Islands, to and through a place outside the United States, specifically, Amman, Jordan, knowing that the monetary instruments and funds involved in the transportation and transfer represented the proceeds of some form of unlawful activity and knowing that such transportation and transfer was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of a specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code Section 1341.

Appx. 7-8; 536 F.3d at 183. The nature of what was transported, how it was transported, how the "transportation and transfer" was "designed . . . to conceal,"[1] to what sort of place or institution in Amman it was transported, and so forth, are not described.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The subject matter jurisdiction of the United States District Court for the Virgin Islands rests upon 48 U.S.C. § 1612(a), (c); the indictment alleges federal and territorial offenses committed in the district. The government's appeal from the dismissal of certain counts of the indictment invoked the Third Circuit's

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[1] See *Regalado Cuellar v. United States*, 553 U.S. — , 128 S.Ct. 1994 (2008).

jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1294(3); *see also* 48 U.S.C. § 1493.

REASONS FOR GRANTING THE WRIT

The opinion of the court below conflicts with that of the Eleventh Circuit in *United States v. Khanani*, 502 F.3d 1281 (11th Cir. 2007), and with a formal confession of error made to the Fifth Circuit (see *United States v. Smith*, 1994 WL 442415, *1 (5th Cir. 1994) (per curiam) (*noted at* 32 F.3d 566)). It also takes this Court's narrowing construction of 18 U.S.C. § 1956 last Term in *United States v. Santos*, and misuses that decision, in disregard of its underlying precepts, as a justification to expand the reach of the money laundering statute. For either or both reasons, this petition for certiorari should be granted.

1. This case provides a suitable opportunity for the Court to resolve at least some of the uncertainty and confusion engendered by the split decision last Term in *United States v. Santos*, 553 U.S. — (2008).

In *United States v. Santos*, 553 U.S. — , 128 S.Ct. 2020 (June 2, 2008), the Court held – on review of a motion under 28 U.S.C. § 2255 – that "proceeds," as used in the federal money laundering statute, 18 U.S.C. § 1956(a), means *profits* rather than *gross*

receipts,[2] at least (as reserved in Justice Stevens' concurring opinion) in the absence of specific legislative history showing otherwise with respect to "proceeds" of a particular form of underlying "specified unlawful activity."[3] And as the plurality pointed out, eight Justices were in agreement (that is, the plurality plus the dissenters) that whatever "proceeds" means in § 1956, it should be the same in all cases. *Id.*[4] Of course, the Court split 4-4 on what that single meaning should be. As a result of this unusual split in the vote, the lower courts are left wondering how to apply *Santos* to cases involving alleged laundering of "proceeds" of other sorts of illegal activity.

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[2] The subsection of the money laundering statute at issue in petitioners' case is § 1956(a)(2)(B)(i), not subsection (a)(1)(A)(i), as in *Santos*. The logic of this Court's decision, however, has nothing to do with which subsection of § 1956 was charged, as long as that subsection requires proof of "proceeds." Nor is *Santos* inapplicable where, as in one count in the instant case, the charge is conspiracy to conduct transactions with "proceeds"; one of the counts overturned in *Santos* charged a § 1956(h) conspiracy. *See* 128 S.Ct. at 2023.

[3] As the plurality stated, "The narrowness of [the fifth-vote concurrence] consists of finding that 'proceeds' means 'profits' when there is no legislative history to the contrary. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist." *Id.* 2031.

[4] One possible reading of *Santos* is therefore easily rejected: that it construes "proceeds" only as applied to federal gambling prosecutions. Even the court below rejected that unreasonably narrow interpretation, although it has been advanced by the government in other cases.

Eventually, unless the matter is resolved by statutory amendment, the Court will probably have to take a case involving the laundering of drug proceeds and try again to reach a majority position.[5] Meanwhile, granting certiorari in the instant case would be a useful first step.

Cases of this kind, where the government alleges that a tax evasion scheme (charged as mail fraud) has "proceeds" in the form of liabilities avoided, present another manifestation of what the *Santos* opinions refer to as the "merger problem." 128 S.Ct. at 2026-28; see also *id.* at 2034-35 (Breyer, J., dissenting). An ongoing scheme to underreport and underpay taxes often involves, but – unlike an unlawful gambling business, as in *Santos* – does not always require that the tax evader engage in, transactions resembling money laundering to complete the commission of the offense and achieve its goals. But tax offenses, as such, are not predicates for money laundering. Where, as here, the government charges a mail fraud scheme consisting of tax evasion, and then predicates

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[5] Interestingly, the recognition of a unique exception to the majority position, reserved by Justice Stevens for contraband cases, would be consistent with the Internal Revenue Code's treatment of the deductibility of expenses of illegal businesses, and thus the taxability of their proceeds. For most criminal enterprises, "ordinary and necessary" expenses are deductible like those of any other business under 26 U.S.C. § 162. But under a 1982 amendment to the Internal Revenue Code, the equivalent expenses of an illegal drug distribution business are not deductible. *Id.* § 280E.

a money laundering theory on the "proceeds" of that scheme, conceived as "tax savings," merger arises as problematically as in any other case. For example, in petitioner's indictment, the "Background" allegations describe check-cashing, deposits in foreign bank accounts, and smuggling of cash as essential aspects of the overall scheme. *E.g.*, Third Supers. Ind. ¶¶ 17, 18, 20, at 6-7. Likewise, the indictment charges the same transportation of funds which constitutes the alleged money laundering of "proceeds" (Counts 44-52, at 20) as overt acts in furtherance of the mail fraud conspiracy. *E.g.*, Third Supers. Ind. ¶ 26.c,d,f,g,i,j,k,l, at 11-12. The merger problem as manifested in this case well illustrates how the decision below is inconsistent with this Court's teaching in *Santos*.

The plurality in *Santos*, invoking the rule of lenity, also explained that it chose the "profits" definition of "proceeds" because "it is always more defendant-friendly than the 'receipts' definition." 128 S.Ct. at 2025. Yet in the decision below, the Court of Appeals chose the *less* "defendant-friendly" definition, by ripping the concept of "profits" loose entirely from the notion of "proceeds," in the fundamental sense of "gross receipts."

Thus, the court below took this Court's holding that "proceeds" means "profits" entirely out of context. The Third Circuit decided that "profits" consisting of tax savings can be the subject of money laundering even when the "specified unlawful activity" (underlying illegal activity), that is, the "mail fraud scheme" to evade the Virgin Islands gross

receipts tax, has no "proceeds" at all in the ordinary sense of the word. And in particular, "tax savings" or "liabilities avoided" are not proceeds that can be concealed, laundered or disguised. Nor is it possible to identify such incorporeal "proceeds" with particular property (or other property traceable thereto or derived therefrom) for purposes of criminal forfeiture, as the related 18 U.S.C. § 982 requires. Instead, all the money allegedly "laundered" in this case was derived, not from tax fraud, but from the lawful income (that is, the proceeds) of the petitioners' grocery store business, as the indictment concedes.[6]

The term "proceeds" – as used in ordinary discourse – does not even ambiguously include the possible meaning of "profits" unless by "profits" one means "net proceeds," that is, the amount of the "gross receipts" of the criminal activity that remains after all the "ordinary and necessary expenses" (*cf.* 26 U.S.C. § 162) of that activity are paid. The *Santos* plurality's explanation of what is meant by "profits" shows that profits are the funds left over from proceeds, after expenses are paid. *See* 128 S.Ct. at 2026 ("the yield of a crime"); *id.* 2026-27 (referring to paying "costs of a crime," such as renting a getaway car, and distributing shares to confederates, prior to

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[6] A wide variety of other, more dramatic allegations against petitioners had been made during the investigation, according to the Third Circuit's earlier decision, discussing the search warrants in this case. See *United States v. Yusuf*, 461 F.3d 374, 379-81 (3d Cir. 2006).

calculation of "profits"). This is the only way that this Court discussed the concept of "profits." By removing the notion of "proceeds" entirely from the "gross vs. net" debate that this Court tried to resolve in *Santos*, the court below further muddied the waters rather than contributing to their clarification.

The Third Circuit ruled that the portion of lawful receipts of a legitimate business that would otherwise have been remitted to the government, but which are retained on account of a criminal failure to pay taxes, constitute "profits" which can be the subject of a money laundering indictment if fraudulent returns have been mailed to the taxing authorities (since mail fraud, but not tax evasion, is a predicate "unlawful activity" for money laundering). In this holding, the court below either failed to understand, or refused faithfully to implement, this Court's decision in *Santos*. To clarify its meaning for the lower courts, the petition for certiorari in this case should be granted.

2. The circuits are divided on whether the term "proceeds," as used in the federal money laundering statute, includes profits from lawful activity retained by a business as a result of willful nonpayment of taxes, or refers only to profits which are the net proceeds of criminal activity.

Two circuits have decided the question presented in this case, reaching opposite conclusions. In a third, the government confessed error and abandoned

money laundering convictions predicated on tax evasion charged as mail fraud, precisely because such offenses do not generate "proceeds" for purposes of 18 U.S.C. § 1956(a). Not only for the reasons given under Point 1, but also to resolve this direct circuit split, the Court should grant the petition in this case.

The decision below conflicts directly with an Eleventh Circuit decision, which it cites in passing but declines to discuss, *United States v. Khanani*, 502 F.3d 1281, 1295-97 (11th Cir. 2007), aff'g *United States v. Maali*, 358 F.Supp.2d 1154 (M.D.Fla. 2005). *Khanani* involved a fact pattern virtually identical with the one involved here. The defendants, owners of retail clothing stores, implemented a scheme to skim money lawfully earned through store sales, funnel it through various shell entities, and use it to pay cash salaries to undocumented workers. They did not report the income and, as a result of the scheme, enjoyed decreased tax liability and increased profits. The indictment charged them, *inter alia*, with money laundering. The district court entered post-verdicts of acquittal on the money laundering counts, holding that:

> [T]he government's cost savings theory is at odds with the plain and ordinary meaning of 'proceeds'. . . . Having ascertained the plain and ordinary definition of 'proceeds,' it is clear that the term does not contemplate profits or revenue indirectly derived from labor or from failure to remit taxes.

Maali, *supra*, 358 F.Supp.2d at 1160. On appeal by the government, the Eleventh Circuit quoted this passage, holding, "We agree." 502 F.3d at 1296.

The instant petition, like *Khanani*, involves a tax case based on alleged unreported income from lawful business activities. Specifically, the government alleges that petitioners skimmed revenues from United Corporation's legitimate retail grocery supermarket operations and filed false Virgin Islands Gross Receipts tax returns which did not report the skimmed income. According to the indictment theory, every time United Corporation mailed its monthly gross receipts tax return, it committed mail fraud. Further, the government contends that petitioners derived "proceeds" from the mail fraud in the amount of the tax that United Corporation saved by skimming some of its retail grocery revenues and omitting those receipts from the 4% calculation reported on the returns.

Petitioners' case is analytically identical to *Khanani*, but the court below hardly mentioned it. *See* Appx. 9; 536 F.3d at 183 (discussing district court's opinion). Indeed, in what appears to have been the first reported prosecution when the government charged money laundering in the context of falsified tax returns, bootstrapped through a mail fraud theory, the case came up on appeal to the Fifth Circuit and the Department of Justice – in a brief signed by a senior attorney of the Criminal Division, Appellate Section – confessed error:

> The indictment charged . . . that appellants engaged in a scheme to defraud the government of tax revenue by engaging in mail and wire fraud to conceal [one appellant's] income. . . . The initial proceeds deposited into the PMC account came from . . . medical fees and thus were not the proceeds of mail or wire fraud or any other illegal activity. Instead, all the transactions involve money that [appellant] had lawfully earned in his medical practice. * * * [D]efrauding the government of tax revenues does not generate 'proceeds' of specified unlawful activity, and the monetary transactions here did not fall within the ambit of the money laundering statute.

Brief for Appellee (U.S.), *United States v. Smith*, No. 92-1612 (5th Cir., filed Feb. 16, 1993), at 27. As a result of this confession, the court of appeals reversed 138 counts of money laundering and remanded for resentencing. See *United States v. Smith*, 1994 WL 442415, *1 (5th Cir. 1994) (per curiam) (*noted at* 32 F.3d 566) (appeal from resentencing, mentioning prior disposition).

The government's brief in *Smith* relied in part on the report of the Senate Committee on the Judiciary, which had recommended enactment of the money laundering provisions. In discussing the specific, tax-related clause of the Act (which in its present form is § 1956(a)(1)(A)(ii)), the Committee expressly recognized that "tax evasion, unlike other crimes, does not have any clearly identifiable 'proceeds'." To constitute

money laundering, the Committee explained, any associated "tax evasion involved in the transaction [must not be] run-of-the-mill inflation of deductions or the like, but rather the nonreporting of income derived from racketeering, foreign drug operations, or other heinous crimes." *See* "Money Laundering Crimes Act of 1986," S. Rep. No. 99-433, 99th Cong., 2d Sess. 11-12 (1986).

The opinion of the court below is squarely contrary to *Khanani* (and the previously-expressed position of the Department of Justice) and cannot be reconciled with it. As stated in a leading treatise:

> The [Third Circuit decision in this] case is especially disturbing because the court never discussed the fact that tax[crimes] are not a specified unlawful activity. The case contradicts *Khanani* in its conclusion that there are no proceeds of a tax offense and, arguably, permits the government to avoid the statutory omission by simply charging a different predicate crime.

2 Ian M. Comisky, Lawrence S. Feld & Steven M. Harris, *Tax Fraud and Evasion* ¶ 11.02[2][d], at S11-11 (2008 cum. supp. #2). On that basis, the treatise authors describe the decision of the court below as "broad" in sweep and "troubling" in its analysis. *Id.*

The opinion of the court below not only ignores all existing precedent, but also creates a direct conflict in the circuits over the meaning of this important statute. The opinion exposes any taxpayer who

knowingly underreports a tax liability on a mailed or e-filed federal income tax return to potential prosecution for mail fraud, and then in turn for money laundering and accompanying forfeitures in addition to the Title 26 tax charges for such underreporting. By creative prosecutorial argument, improperly endorsed by the court below, the specially defined and narrowly penalized Title 26 offenses are catapulted into Title 18 criminal charges, vastly multiplying their penalties over those designed by Congress.

Relying on bankruptcy fraud cases, and the fact the bankruptcy fraud is a "specified unlawful activity" for money laundering purposes, the court below bolsters its conclusion that funds "retained" as a result of unlawful activity can be treated as proceeds. The property involved in bankruptcy fraud is not "retained" by the perpetrator in the same way that most unpaid taxes are. All of a debtor's property belongs to the estate once the debtor files for bankruptcy, and by concealing an asset from the trustee and the court the debtor is embezzling it from the bankruptcy estate. Courts have characterized such assets as "proceeds" of bankruptcy fraud under 18 U.S.C. § 1956(c)(7)(D) for purposes of money laundering, because the wrongdoers concealed or disguised the assets from the trustee in bankruptcy in order to make them once again their own.

Not one case cited by the court below conflicts with the rationale of *Khanani*. In each cited case, the "proceeds" consisted of a specific asset – bonds, stores, checks – that the defendant concealed from the

bankruptcy estate to make his own. See, *e.g.*, *United States v. Brennan*, 326 F.3d 176 (3d Cir. 2003); *United States v. Ladum*, 141 F.3d 1328 (9th Cir. 1998); *United States v. Levine*, 970 F.2d 681 (10th Cir. 1992). Here, there are simply no specific assets identified as "tax savings" requiring concealment (whether "retained" or "obtained").

The other tax case discussed by the court below is like the bankruptcy cases; it would not justify the unprecedented conclusion reached in this case. In *United States v. Morelli*, 169 F.3d 798 (3d Cir. 1999), the "unpaid taxes" were not "tax savings" as in the present case. *Morelli* is not about someone underreporting and underpaying on an individual or corporate tax return; rather, it is about defendants *embezzling* gasoline excise tax money they *collected* from retail fuel customers that they were supposed to pay over to the government. The *Morelli* defendants actively concealed the funds collected so as not to pay them over. Thus, *Morelli* involved a scheme to conceal and to launder actual funds taken from customers under false pretenses, and which were, upon collection, held in trust for the government. In contrast, the instant case does not involve a tax paid at the source and held in trust, like excise taxes, employment taxes or some sales taxes. In the instant case, there exist no such funds or assets that could have been concealed or laundered.

Nothing in the legislative history of the money laundering statutes (nor anything in Justice Alito's elaboration of that history in the *Santos* dissenting

opinion) suggests that mail fraud – much less the sort of attenuated "mail fraud" involving the filing of understated tax returns involved here – would be an offense meeting Justice Stevens' criteria for distinguishing the plurality's holding in *Santos* – crimes whose gross receipts Congress may specifically have understood as criminal "proceeds." To the contrary, as quoted above, the legislative history specifically *excludes* tax offenses from the category of crimes which can generate the funds which are the subject of a valid money laundering charge. S. Rep. No. 99-433, *supra*, at 11 ("tax evasion, unlike other crimes, does not have any clearly identifiable 'proceeds'"). The "fraud" alleged in this case to constitute the underlying "specified unlawful activity" simply did not generate any "proceeds" on *either* the plurality's *or* the dissenters' understanding of the statutory language.

The court below cited this Court's decision in *Pasquantino v. United States*, 544 U.S. 349 (2005), to support its conclusion (Appx. 25; 536 F.3d at 190), but that case lends it no support. In *Pasquantino*, the defendants were convicted of wire fraud, but money laundering was not charged. The Court held that the "entitlement to collect money from the petitioners," was a property right of the Government of Canada. 544 U.S. at 355-56. The Court did not suggest that the unpaid tax underlying that property right also constituted "proceeds" to the defendants under the money laundering statute. The taxing authority's intangible entitlement to tax revenues – unlike the bonds in *Brennan*, the stores in *Ladum*, the checks in

Levine, or the collected excise taxes in *Morelli* – is "property" of which the government was defrauded. But an "entitlement" of which the victim has been deprived does not necessarily equate to "proceeds" that can be concealed, disguised or laundered. Thus, the decision in *Pasquantino* is in no way challenged by pointing out that the present case illustrates several of the dangers against which the dissenters in that case warned: federal prosecutors extending their use of the mail fraud law to reach into local governmental issues, and multiplying of penalties by triggering money laundering, racketeering and forfeiture claims which are not authorized in a tax case prosecuted as such.

The writ should be granted both to resolve the conflict in the circuits and to enforce this Court's effort to restrict the term "proceeds" in the money laundering statute to its legislatively intended scope.

CONCLUSION

For the foregoing reasons, petitioners pray that this Court grant their petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit, reinstating the order dismissing the money laundering counts from their indictment.

Respectfully submitted,

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January 30, 2009

536 F.3d 178

United States Court of Appeals, Third Circuit.

UNITED STATES of America; Government of the Virgin Islands, Appellant

v.

Fathi Yusuf Mohammed YUSUF a/k/a Fathi Yusuf; Waleed Mohammed Hamed a/k/a Wally Hamed; Waheed Mohammed Hamed a/k/a Willie Yusuf; Maher Fathi Yusuf a/k/a Mike Yusuf; Isam Mohamad Yousuf a/k/a Sam Yousef; United Corporation, d/b/a Plaza Extra; Nejeh Fathi Yusuf.

No. 07-3308.

Argued Dec. 11, 2007.
Opinion Filed: June 17, 2008.
As Amended July 21, 2008.

Richard T. Morrison, Esquire, Acting Assistant Attorney General, S. Robert Lyons, Esquire (Argued), Anthony J. Jenkins, Esquire, Alan Hechtkopf, Esquire, United States Attorney, United States Department of Justice, Tax Division, Washington, DC, for Appellant.

Gordon C. Rhea, Esquire (Argued), Richardson, Patrick, Westbrook & Brickman, LLC, Mt. Pleasant, SC, Randall P. Andreozzi, Esquire, Marcus, Andreozzi, Fickess, LLP, Williamsville, NY, Pamela L. Colon, Esquire, John K. Dema, Esquire, Thomas Alkon, Alkon & Meaney, Christiansted, St. Croix USVI, Derek M. Hodge, Esquire, MacKay & Hodge, Charlotte Amalie, St. Thomas, USVI, Henry C. Smock, Esquire, Smock Law Offices, Charlotte Amalie, St. Thomas, USVI, for Appellee.

Before: SMITH, NYGAARD and ROTH, Circuit Judges.

OPINION

ROTH, Circuit Judge:

The government has appealed the District Court's pretrial order, dismissing from the indictment various counts and allegations based on international money laundering.[1] The narrow issue on appeal is whether unpaid taxes, which were unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail, are "proceeds" of mail fraud for purposes of sufficiently stating a money laundering offense under the federal, international money laundering statute, 18 U.S.C. § 1956(a)(2). We hold that such unpaid taxes are "proceeds" of mail fraud for purposes of sufficiently stating an international money laundering offense. For this reason, we will vacate the orders of the District Court and remand the case for further proceedings consistent with this opinion.

I. *Background*

Because we have previously outlined the facts of this case in *United States v. Yusuf*, 461 F.3d 374 (3d

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[1] The government also appeals from the District Court's order to release notices of *lis pendens* with respect to various properties listed in the indictment.

Cir.2006) and *United States v. Yusuf,* 199 Fed.Appx. 127 (3d Cir.2006), we recite only those facts pertinent to our analysis in this particular appeal.

There are seven defendants in this case: (1) United Corporation, a family-owned business located in the Virgin Islands that operates a chain of three Plaza Extra Supermarket stores in St. Thomas and St. Croix; (2) Fathi Yusuf, the primary shareholder of United; (3) Maher "Mike" Yusuf, Fathi's son, who is a part-owner of United and manager of one of the Plaza Extra stores; (4) Waheed "Willie" Hamed, Fathi's nephew, who manages the second Plaza Extra store; (5) Waleed "Wally" Hamed, Fathi's nephew and Waheed's brother, who manages the third Plaza Extra store; (6) Isam "Sam" Yousef, Fathi's nephew, who is a resident of St. Maarten, Netherlands Antilles, and owns and operates a retail furniture and appliances store; and (7) Nejeh Fathi Yusuf, Fathi's son, who is an owner and employee of United and who participated in the operation of the Plaza Extra stores.

Because defendant United conducts business through its Virgin Islands supermarkets, it is required to comply with statutorily-mandated monthly reporting of gross receipts and payment of tax on those receipts. Section 43(a), Title 33, of the Virgin Islands Code provides, in pertinent part, that "[e]very individual and every firm, corporation, and other association doing business in the Virgin Islands shall *report their gross receipts* and *pay a tax of four percent (4%) on the gross receipts* of such business." 33 V.I.C. § 43(a) (emphasis added). Section 44(c) provides for

monthly returns and payments and states that "[t]he returns and payments required by this subsection shall be due within 30 calendar days following the last day of the calendar month concerned." 33 V.I.C. § 44(c). Thus, taxes imposed on United's gross sales receipts from its supermarkets during a particular month were due and payable on the last day of the following month.

In July 2001, the Federal Bureau of Investigation (FBI) received a suspicious activity report from the Bank of Nova Scotia in St. Thomas, U.S. Virgin Islands. The report stated that, over a four day period in April 2001, $1,920,000 (in $50 and $100 bills) was deposited into United's bank account. The FBI began an investigation which revealed that defendants allegedly conspired to avoid reporting $60,000,000 of the supermarkets' gross receipts on United's Virgin Islands gross receipts monthly tax returns and failed to pay the Virgin Islands government the 4% tax that United owed on those unreported gross receipts.[2] The

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[2] Specifically, after Plaza Extra Supermarkets' sales receipts were collected each day, the funds were typically transferred to the "cash room," to which only certain individuals, including defendants, were permitted access. In the cash room, Plaza Extra employees counted the sales receipts and prepared bank deposit slips. The indictment alleged that defendants directed the employees to withhold from deposit substantial amounts of cash received from sales, typically in denominations of $100, $50, and $20. Instead of being deposited into the bank accounts with other sales receipts, this cash was allegedly delivered to one of the defendants or placed in a designated safe in the cash room. The indictment further alleged that, from 1996

(Continued on following page)

investigation further revealed that defendants allegedly engaged in various efforts to disguise and conceal the illegal scheme and its proceeds.[3] Such efforts included allegedly depositing these monies into bank accounts, controlled by defendants, outside of the United States.

On September 9, 2004, a grand jury in the Virgin Islands returned a seventy-eight count, superseding[4] indictment, charging various counts relating to mail fraud, tax evasion, and international money laundering.[5] At Counts 3 through 43, the indictment charged

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through 2001, tens of millions of dollars in cash was withheld from deposit in this manner and was not reported as gross receipts on both Virgin Islands and federal tax returns filed by United.

[3] For example, with the unreported cash, defendants allegedly purchased, and directed other individuals to purchase, cashier's checks, traveler's checks, and money orders, typically from different bank branches and made payable to outside parties, in order to disguise the cash as legitimate financial instruments and to evade federal record-keeping mandates.

[4] The grand jury handed down the original indictment in this case on September 18, 2003.

[5] The charges included conspiracy to commit mail fraud and structure financial transactions, in violation of 18 U.S.C. § 371 (Count 1); conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), (a)(2)(B)(i) (Count 2); mail fraud, in violation of 18 U.S.C. § 1341 (Counts 3-43); international money laundering, in violation of 18 U.S.C. § 1956(a)(2)(B)(I) [sic] (Counts 44-52); structuring financial transactions, in violation of 31 U.S.C. § 5324(a)(3), (d)(2) (Counts 53, 54, 77); conspiracy to evade taxes, in violation of 33 V.I.C. § 1522 (Count 55); causing the filing of false tax returns, in violation of 33 V.I.C. § 1525(2) (Counts 56-60); causing the filing of false tax returns, in

(Continued on following page)

forty mail fraud offenses, in violation of 18 U.S.C. § 1341, alleging in paragraphs 30 and 31 as follows:

> Beginning at least as early as in or about January 1996 and continuing through at least in or about September 2002, in the District of the Virgin Islands and elsewhere, [defendants] knowingly and willfully devised and intended to devise a scheme and artifice to defraud and to obtain money and property, specifically money belonging to the Virgin Islands in the form of territorial gross receipts tax revenue, by means of material false and fraudulent pretenses, representations and promises, knowing that the pretenses, representations and promises were false when made, as more particularly described in paragraphs 9 through 12 and 14 through 20[6] of this Indictment.

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violation of § 26 U.S.C. § 7206(2) (Counts 61-74); engaging in criminal enterprise, in violation of 14 V.I.C. § 605(a) (Count 75); conspiracy to engage in a criminal enterprise, in violation of 14 V.I.C. § 605(d) (Count 76); and obstruction of justice, in violation of 18 U.S.C. § 1503. The indictment further contained an asset forfeiture allegation, pursuant to 18 U.S.C. § 982, 21 U.S.C. § 853, and 14 V.I.C. § 606.

[6] Paragraphs 9 through 12 alleged that defendants "defrauded the Virgin Islands of money in the form of tax revenue, specifically territorial gross receipts taxes [owed by United] as well as corporate income taxes [owed by United], by failing to report at least $60 million in Plaza Extra sales on gross receipts tax returns and corporate income tax returns" filed by United. Paragraphs 14 through 20 alleged that defendants concealed the fraud and its proceeds by smuggling checks and currency and by structuring cash transactions to evade reporting requirements.

> On or about the dates specified in each count below, the defendants, for the purpose of executing and attempting to execute and in furtherance of the aforesaid scheme and artifice to defraud and for obtaining money and property by means of material false and fraudulent pretenses, representations and promises, did knowingly cause to be sent and moved by the United States Postal Service, at the East End United States Post Office in St. Thomas, Gross Receipts Monthly Tax Returns, Forms 720 V.I., addressed to the Virgin Islands Bureau of Internal Revenue, St. Thomas, Virgin Islands, 00802.

At Counts 44-52, the indictment charged nine substantive international money laundering offenses, in violation of 18 U.S.C. § 1956(a)(2)(B)(i), alleging in paragraph 33 as follows:

> On or about the dates listed in each count below, in the District of the Virgin Islands and elsewhere, the [defendants] transported and transferred, and attempted to transport and transfer, monetary instruments and funds in amounts described below from a place in the United States, specifically the United States Virgin Islands, to and through a place outside the United States, specifically, Amman, Jordan, knowing that the monetary instruments and funds involved in the transportation and transfer represented the proceeds of some form of unlawful activity and knowing that such transportation and transfer was designed in whole or in part to conceal and disguise the

> nature, location, source, ownership, and control of the proceeds of a specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code Section 1341.

Thus, the indictment relied on mail fraud as the predicate offense, or "specified unlawful activity," to support the money laundering charges against defendants. *See* 18 U.S.C. § 1956(a)(2)(B)(i).

Defendants moved to dismiss the substantive money laundering charges on the basis that any unpaid taxes disguised and retained as a result of filing false tax returns through the U.S. mail do not equate to "proceeds" of mail fraud and, accordingly, Counts 44 through 52, charging money laundering, failed to state an offense. On February 13, 2007, the District Court granted the motion and dismissed the nine substantive money laundering counts for failure to state an offense. For the same reason, the District Court also dismissed the charge of money laundering conspiracy (Count 2); struck from two structuring counts the sentence-enhancing allegations grounded upon money laundering (Counts 53 and 54); and dismissed paragraphs of Criminal Forfeiture Allegation 1, which were grounded upon money laundering. The District Court reasoned as follows:

> Defendants contend that a tax savings resulting from filing false tax returns does not "represent the proceeds of some form of unlawful activity," and that, therefore, Counts 44 through 52 fail to state an offense. In the Third Circuit, "'proceeds' as that term is

used in § 1956 means simply gross receipts from illegal activity.'" *United States v. Grasso*, 381 F.3d 160, 169 (3d Cir.2004) [*overruled by United States v. Santos*, ___ U.S. ___, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008)]. "'[P]roceeds' are something which is obtained in exchange for the sale of something else as in, most typically, when one sells a good in exchange for money." *United States v. Maali*, 358 F.Supp.2d 1154, 1158 (M.D.Fla.2005)[,] [*aff'd sub nom. United States v. Khanani*, 502 F.3d 1281 (11th Cir.2007)]. The Court agrees with the final analysis in Maali [sic], that "[h]aving ascertained the plain and ordinary definition of 'proceeds,' it is clear that the term does not contemplate profits or revenue indirectly derived . . . from the failure to remit taxes." *Id.* at 1160. The cost savings theory was also rejected in *Anderson v. Smithfield Foods, Inc.*, 209 F.Supp.2d 1270, 1275 (M.D.Fla.2002):

> The money that Defendants allegedly illegally obtained to violate RICO and environmental laws, and to allegedly commit mail and wire fraud, was money that Defendants legally obtained through the operation of its business. Saving money as a result of the alleged noncompliance with the requirements of an environmental statute does not make the money illegally obtained for the purposes of the money laundering statute.

The mailing of the allegedly false gross tax returns did not result in proceeds, as that

> term is commonly interpreted. Accordingly, [the counts charging money laundering] are dismissed for failure to state an offense.

Accordingly, in the District Court's view, the *tax savings* (*i.e.*, unpaid taxes) cannot be considered "proceeds" of mail fraud because such *tax savings* (1) represented a percentage of unreported gross receipts that were *lawfully obtained* in the day to day business of Plaza Extra Supermarket, and, thus, such tax savings cannot thereafter be categorized as "proceeds" from an unlawful activity; and (2) were merely *retained,* rather than *obtained,* money resulting from defendants' noncompliance with the Virgin Islands' gross receipts reporting statute.

On June 25, 2007, the District Court denied the government's motion for reconsideration and ordered the government to release its notices of *lis pendens* with respect to various properties listed in the indictment. The government appealed the February 13 order dismissing the substantive money laundering counts (and paragraphs) and the two June 25 orders denying reconsideration and ordering release of the notices of *lis pendens.*

II. *Jurisdiction and Standard of Review*

The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 and 48 U.S.C. § 1612(c). We have jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1294(3).

The "sufficiency of an indictment to charge an offense is a legal question subject to plenary review." *United States v. Conley,* 37 F.3d 970, 975 n. 9 (3d Cir.1994). "An indictment is generally deemed sufficient if it: (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Rankin,* 870 F.2d 109, 112 (3d Cir.1989) (internal quotation marks and citations omitted). An indictment does not state an offense sufficiently if the specific facts that it alleges "fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *United States v. Panarella,* 277 F.3d 678, 685 (3d Cir.2002).

III. *Discussion*

There is no dispute that the indictment sufficiently alleges mail fraud, pursuant to 18 U.S.C. § 1341. There is also no dispute that mail fraud is a predicate offense for a charge of international money laundering, pursuant to 18 U.S.C. §§ 1956(a)(2)(B)(i) (elements of international money laundering)[7], 1956(c)(7)(A)

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[7] The federal money laundering statute, 18 U.S.C. § 1956(a)(2), provides:

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States

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(the term "specified unlawful activity" includes any racketeering activity under RICO) and 1961(1)(B) (mail fraud is a racketeering activity)[8]. The narrow issue in this appeal is whether unpaid taxes unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail are "proceeds" of mail fraud for purposes of sufficiently stating an offense for money laundering.

As a threshold matter, we first address the District Court's view that funds originally procured through lawful activity can be classified only as proceeds of that lawful activity and cannot thereafter

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> to or through a place outside the United States or to a place in the United States from or through a place outside the United States . . .
>
> > (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the *proceeds of some form of unlawful activity* and knowing that such transportation, transmission, or transfer is designed in whole or in part –
> >
> > > (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the *proceeds of specified unlawful activity*; . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(2)(B)(i) (emphasis added).

[8] Under 18 U.S.C. § 1961(1), mail fraud is a "specified unlawful activity," but tax fraud simpliciter is not.

be converted into proceeds of a specified unlawful activity.

Although the federal money laundering statute does not define what constitutes "proceeds" of a specified unlawful activity, *see United States v. Santos*, ___ U.S. ___, 128 S.Ct. 2020, 2024, 170 L.Ed.2d 912 (2008), it specifically identifies which criminal offenses constitute "specified unlawful activities." 18 U.S.C. § 1956(c)(7). The term "specified unlawful activity" covers a broad array of offenses.[9] For example, the fraudulent *concealment* of a bankruptcy estate's assets is categorized as a "specified unlawful activity." *See* 18 U.S.C. §§ 1956(c)(7)(A), 152(1) (criminalizing the concealment of assets relating to § 152). Thus, property which is required to be included in a bankruptcy debtor's estate but is instead undeclared, and thus *retained,* is "proceeds" of a bankruptcy fraud offense under 18 U.S.C. § 152(1). *United States v. Brennan,* 326 F.3d 176, 190 (3d Cir.2003) (the defendant, debtor-in-possession, transferred bonds belonging to the bankruptcy estate to a third person who cased the bonds and invested the proceeds for the defendant's benefit). Moreover, simply because funds are *originally* procured through *lawful* activity does

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[9] That term is defined, in pertinent part, by reference to those criminal activities that constitute racketeering under RICO. 18 U.S.C. § 1956(c)(7)(A) ("[T]he term 'specified unlawful activity' means any act or activity constituting an offense listed in section 1961(1) of this title. . . ."). As previously noted, mail fraud is categorized as a racketeering act and thus falls within the purview of the money laundering statute.

not mean that one cannot thereafter convert those same funds into the "proceeds" of an unlawful activity. *See United States v. Ladum,* 141 F.3d 1328, 1340 (9th Cir.1998) (sustaining money laundering conviction where the defendant concealed rental income derived from lawfully operated retail stores); *United States v. Levine,* 970 F.2d 681, 686 (10th Cir.1992) (sustaining money laundering conviction where the defendant concealed corporate tax refund checks deposited in a hidden bank account). Accordingly, we reject the suggestion that to qualify as "proceeds" under the federal money laundering statute, funds must have been *directly* produced by or through a specified unlawful activity, and we agree that funds *retained* as a result of the unlawful activity can be treated as the "proceeds" of such crime.

Furthermore, the Supreme Court, in *United States v. Santos,* recently clarified that the term "proceeds," as that term is used in the federal money laundering statute, applies to criminal profits, not criminal receipts, derived from a specified unlawful activity. ___ U.S. ___, 128 S.Ct. 2020, 2025, 170 L.Ed.2d 912 (applying the rule of lenity to interpret the ambiguous term "proceeds" to mean "profits" of a criminal activity rather than "receipts"). In *Santos,* the defendants were convicted of violating 18 U.S.C. § 1956(a)(1)(A)(i) – the subsection of the federal money laundering statute that criminalizes financial transactions using the proceeds of a specified unlawful activity with the intent to promote the carrying on of such activity. The Supreme Court affirmed the trial

court's decision to vacate the money laundering convictions because the transactions on which such convictions were based involved the gross receipts, as opposed to the profits, of the specified unlawful activity – the operation of an illegal lottery.[10] The Supreme Court reasoned that the transactions upon which the money laundering charges were based could not be considered to have involved "proceeds" of the illegal lottery's operation because such transactions involved the mere payment of the illegal operation's *expenses* rather than the operation's *profits*.[11]

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[10] In that case, defendant Santos operated an illegal lottery. He employed individuals known as "runners" to collect the gamblers' bets. Upon receipt of the bets, the runners retained a small portion as their commission and handed over the remaining money to individuals known as "collectors," one of whom was defendant Diaz. The collectors would then deliver such money to Santos, who used a portion of it to pay the collectors' salaries and pay the winners. The payments to the runners, collectors, and winners were identified in an indictment as the "transactions" upon which money laundering charges were based under 18 U.S.C. § 1956(a)(1)(A)(i) (criminalizing transactions which promote criminal activity).

[11] The Supreme Court reasoned as follows:

> Transactions that normally occur during the course of running a lottery are not identifiable uses of profits and thus do not violate the money-laundering statute. More generally, a criminal who enters into a transaction paying the expenses of his illegal activity cannot possibly violate the money-laundering statute, because by definition profits consist of what remains after expenses are paid. Defraying an activity's costs with its receipts simply will not be covered.

Santos, ___ U.S. ___, 128 S.Ct. 2020, 2026, 170 L.Ed.2d 912.

Santos, ___ U.S. ___, 128 S.Ct. 2020, 2026, 170 L.Ed.2d 912.[12]

Moreover, we have previously determined that "proceeds are derived from an already completed offense, or a completed phase of an ongoing offense, before they can be laundered." *United States v. Conley*, 37 F.3d 970, 980 (3d Cir.1994).

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[12] In *Santos*, a four-Justice plurality concluded that, in applying the rule of lenity, the word "proceeds" in the money laundering statute means profits and not, as the government had argued, gross receipts. 128 S.Ct. at 2023-25 (plurality opinion). Justice Stevens, the tie-breaker, took the view in his concurring opinion that, depending on the import of legislative history, proceeds may mean profits as applied to some specified unlawful activities and gross receipts as applied to others. 128 S.Ct. at 2031-32 (Stevens, J., *concurring*); *see id.* at 2030 (stating that "Justice STEVENS expresses the view that the rule of lenity applies to this case because there is no legislative history reflecting any legislator's belief about how the money-laundering statute should apply to lottery operators") (*citing id.* at 2032-33). As the plurality recognized, "[s]ince his vote is necessary to our judgement, and since his opinion rests upon the narrower ground, the Court's holding is limited . . . ," to the holding " . . . that 'proceeds' means 'profits' when there is no legislative history to the contrary." 128 S.Ct. at 2031 (*citing Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

In view of the above discussion, we believe that *Santos* overrules this Court's decision in *United States v. Grasso*, which was relied upon by the District Court in the instant case. *Grasso*, 381 F.3d 160, 169 (3d Cir.2004) (holding that " 'proceeds,' as that term is used in the money laundering statute, means gross receipts [from illegal activity] rather than profits").

Having thus elucidated the definition of "proceeds," we will next consider how the term "proceeds" relates to the predicate offense of mail fraud. The mail fraud statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341. Stated plainly, the elements necessary to establish the offense of mail fraud are (1) a scheme or artifice to defraud for the purpose of obtaining money or property and (2) use of the mails in furtherance of the scheme. Therefore, once these two requirements are met, mail fraud has been committed.

The Supreme Court has previously interpreted the elements of mail fraud. A scheme to defraud need not contemplate the use of mails as an essential part of the scheme so long as the mailing is "incident to an essential part of the scheme." *Schmuck v. United States*, 489 U.S. 705, 710-11, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) (*citing Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954) *and*

quoting Badders v. United States, 240 U.S. 391, 394, 36 S.Ct. 367, 60 L.Ed. 706 (1916)). Under the mail fraud statute, the mailing must be for the "purpose of executing the scheme."[13] *Kann v. United States,* 323 U.S. 88, 94, 65 S.Ct. 148, 89 L.Ed. 88 (1944). Furthermore, a mailing cannot be said to be in furtherance of a scheme to defraud, nor can a mailing be considered even incident to an essential part of the scheme, when it occurs after the scheme has reached fruition. *Id.* at 94-95, 65 S.Ct. 148.

In *Schmuck,* the defendant was a used-car distributor who purchased used cars, rolled back their odometers and sold the vehicles to retail dealers at prices he was able to inflate by reason of the low-mileage readings. The dealers, unaware of the fraud, resold the automobiles to their customers, who also paid inflated prices. The Supreme Court held that the mailing element was satisfied by the dealers' mailings of title application forms to the state of Wisconsin on behalf of the customers, explaining that "a rational jury could have found that the title-registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until

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[13] In *Kann,* the defendants cashed fraudulently obtained checks at various banks, knowing that the checks would be forwarded to a drawee bank for collection. The Supreme Court found that the mailing was not material to the consummation of the scheme and thus concluded that there was no mail fraud. 323 U.S. at 94, 65 S.Ct. 148 ("It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.").

the retail dealers resold the cars and effected transfers of title." *Schmuck,* 489 U.S. at 712, 109 S.Ct. 1443. Finding that the scheme would have come to an end if the dealers had lost faith in the distributor or were unable to re-sell the cars, the Court concluded that "although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme." *Id.*

Moreover, in *United States v. Morelli,* we affirmed a district court's judgments of conviction and sentence and concluded that unpaid taxes that were unlawfully disguised and retained constituted "proceeds" of wire fraud for purposes of supporting a conviction on a federal money laundering charge.[14] 169 F.3d 798, 806 (3d Cir.1999) The defendant in

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[14] Wire fraud, like mail fraud, is a racketeering activity and thus a predicate offense for money laundering. *See* 18 U.S.C. §§ 1956(a)(2)(B)(i), (c)(7)(A); *see also* 18 U.S.C. § 1961(1). The federal wire fraud statute, 18 U.S.C. § 1343, is nearly identical to the federal mail fraud statute. *See Morelli,* 169 F.3d at 806 (stating that "[w]ire fraud consists of (1) a scheme to defraud and (2) a use of a wire transmission for the purpose of executing, or attempting to execute, the scheme"); *see also id.* at 806 n. 9 (explaining that the federal wire fraud and mail fraud statutes "differ only in form, not in substance, and cases . . . interpreting one govern the other as well"); *see also United States v. Tarnopol,* 561 F.2d 466, 475 (3d Cir.1977) ("[T]he cases interpreting the mail fraud statute are applicable to the wire fraud statute as well.").

Morelli was involved in a "daisy chain"[15] scheme which included a series of transactions that resulted in the embezzlement of excise taxes from fuel sales. The "daisy chain" scheme operated as follows:

> The particular scheme in which the defendants participated was termed "the Association." The Association organized a group of companies, all of which it controlled, into a "daisy chain," for the purpose of embezzling the excise taxes on the sale of certain kinds of fuel. Typically, the companies would sell oil down the chain in a series of paper transactions, through what was referred to as the "burn company." Eventually, the company at the bottom of the chain, the "street company," would sell the oil to a legitimate retailer, i.e., a particular gas station, for a price slightly below the tax-included market price. This retailer would pay money to the street company, which would send money back up the chain in a series of wire transfers.

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[15] The elements of "daisy chain" schemes have previously been detailed in this circuit and others. *See, e.g., United States v. Sertich*, 95 F.3d 520, 522 (7th Cir.1996), *cert. denied*, 519 U.S. 1113, 117 S.Ct. 952, 136 L.Ed.2d 840 (1997); *United States v. Veksler*, 62 F.3d 544, 547 (3d Cir.1995); *United States v. Macchia*, 35 F.3d 662, 665-66 (2d Cir.1994); *United States v. Victoria-21*, 3 F.3d 571, 573 (2d Cir.1993); *In re Assets of Martin*, 1 F.3d 1351, 1353 (3d Cir.1993); *United States v. Tarricone*, 996 F.2d 1414, 1416-17 (2d Cir.1993); *United States v. Aracri*, 968 F.2d 1512, 1514-17 (2d Cir.1992); *United States v. Musacchia*, 900 F.2d 493, 495-96 (2d Cir.1990), *vacated*, 955 F.2d 3 (2d Cir.1991).

> This scheme was illegal because it was set up as a means to avoid excise taxes. The daisy chain was established so that the burn company was the one legally responsible for collecting the excise taxes on the fuel sales and transmitting them to the government. In the Association's scheme, the burn company would collect the taxes for a time, and then disappear without ever paying the taxes to the government. As a result, the Association could keep the money representing the excise taxes without the government being able to determine where it had gone.

Id. at 803. On appeal, the defendant claimed that the money represented the "proceeds" of tax fraud, not the "proceeds" of a wire fraud, because the wiring itself had nothing to do with the Association's coming into possession of the money. We did not agree.

In affirming the trial court's judgments of conviction and sentence on the money laundering charge, we held that the money wired up through the "daisy chain" constituted "proceeds" of wire fraud based on the nature of the *entire ongoing fraudulent scheme.* 169 F.3d 798, 806-07. We reasoned as follows:

> We think the money was the proceeds of the *entire ongoing fraudulent venture* in which the Association engaged in creating the daisy chain scheme, and that this venture was a wire fraud scheme. This ongoing venture consisted of all the individual series of transactions upon which [the defendant] focuses, not the discrete series of

> transactions individually. *Although each series may have included discrete acts of wire fraud that followed the creation of the proceeds related to that series, the fact is that the entire program, encompassing all of the acts charged in the indictment, constituted one large, ongoing wire fraud scheme. Each wiring in each series furthered the execution of each and every individual act of tax fraud, and helped to create the proceeds involved in each succeeding series of transactions.* This is primarily because each wiring, whether it occurred before or after a given act of tax fraud, served to promote and conceal each individual embezzlement of taxes, either *ex ante* or *ex post*. *More precisely, each wiring, including those that occurred before a particular transaction, made it more difficult for the government to detect the entire fraudulent scheme or any particular fraudulent transaction or series of transactions.* In sum, the money gained in each series of transactions (save the initial one) was the proceeds of wire fraud because the money was the proceeds of a fraud that was furthered by the prior wirings.

Morelli, 169 F.3d at 806-07 (emphasis added); *see also id.* at 808 (*quoting Schmuck*, 489 U.S. at 712, 109 S.Ct. 1443 ("Each wiring 'was essential to the perpetuation of [the Association]'s scheme.")). Finally, we concluded that, under the reasoning in *Schmuck*, each wiring contributed to the entire scheme and made each subsequent individual fraudulent transaction

series more likely to be successful and less likely to be detected. *See Morelli,* 169 F.3d at 807.

Based upon the Supreme Court's decisions in *Santos, Schmuck*, and *Kann,* and our decision in *Morelli,* we hold that unpaid taxes, which are unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail, constitute "proceeds" of mail fraud for purposes of supporting a charge of federal money laundering. Here, 4% of the unreported gross receipts that should have been paid as tax to the Virgin Islands but were instead included in the lump sums of money which the defendants sent to Amman, Jordan, were clearly "proceeds" of the fraudulent scheme perpetuated by defendants. Specifically, the defendants' fraudulent scheme was that of concealing certain gross receipts from the Virgin Islands government through the mailing of fraudulent tax returns in order to defraud, cheat, and deprive the government of the 4% gross receipts taxes it was owed, thus enabling the defendants to unlawfully retain such government property and profit from their scheme. *See Pasquantino v. United States,* 544 U.S. 349, 355-56, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) (holding that Canada's right to uncollected excise taxes on imported liquor is "property" in its hands, depriving Canada of that money inflicts "an economic injury no less than had they embezzled the funds from the Canadian treasury."); *Hammerschmidt v. United States,* 265 U.S. 182, 188, 44 S.Ct. 511, 68 L.Ed. 968 (1924) (explaining that to defraud the United States primarily means "to cheat the

government out of property or money" and to deprive the government of "something of value by trick, deceit, chicane, or overreaching"). Here, the mailings were both for the purpose of executing the scheme and were material to the consummation of the scheme. *See Kann,* 323 U.S. at 94, 65 S.Ct. 148. The use of the mail to file fraudulent tax returns and fail to pay all taxes owed was not only incident to an essential part of the scheme, but also was clearly *an* essential part of the scheme because such mailings were the defendants' way of concealing the scheme itself by making the fraudulently reported gross receipts seem legitimate. *See Schmuck,* 489 U.S. at 711, 109 S.Ct. 1443; *Pereira,* 347 U.S. at 8, 74 S.Ct. 358.

Furthermore, the mailings of the fraudulent tax returns resulted in "proceeds" of mail fraud based on the nature of the *entire ongoing fraudulent scheme* because the unpaid taxes unlawfully retained by defendants represented the "proceeds" of a fraud that was also furthered by previous mailings. *See Morelli,* 169 F.3d at 806-07. Each mailing, whether it occurred before or after a given act of tax fraud, served to promote and conceal each month's unlawful retention of taxes, either *ex ante* or *ex post,* and made it more difficult for the government to detect the entire fraudulent scheme. *See id.* Moreover, each mailing of the fraudulent tax forms "contributed directly to the duping" of the Virgin Islands government, and subsequent mailings were essential to keep defendants' scheme going because it would have come to an end if

the tax collecting authorities did not continue to receive these mailings. *See Schmuck*, 489 U.S. at 712, 109 S.Ct. 1443. Accordingly, it logically follows that the unpaid taxes, unlawfully disguised and retained through the mailing of the tax forms, were "proceeds" of defendants' overall scheme to defraud the government. This scheme was both dependent on and completed by the monthly mailing of the false Virgin Islands gross receipts tax returns.

Finally, in light of the Supreme Court's decision in *Santos*, we recognize that the "proceeds" from the mail fraud in this case also amount to "profits" of mail fraud. *See* ___ U.S. ___, 128 S.Ct. 2020, 2025, 2036, 170 L.Ed.2d 912. By intentionally misrepresenting the total amount of Plaza Extra Supermarkets' gross receipts through the mailing of fraudulent tax returns, the defendants were able to secretly "pocket" the 4% gross receipts taxes on the unreported amounts which were the property of the Virgin Islands government. *Cf.*, *Pasquantino v. United States*, 544 U.S. 349, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) (recognizing no material difference between defrauding a government of taxes due and embezzling money from the treasury, the Supreme Court held that unpaid tax constituted property under the wire fraud statute). Other than some small expenses incurred in perpetuating the mail fraud – i.e., the postage stamp affixed to their monthly tax return or any other preparation fees relating to the return – the unpaid taxes retained by defendants amounted to profits. Once these profits were included in the lump

sums sent abroad by defendants, the offense of international money laundering was complete.

IV. *Conclusion*

Based on the foregoing, we will vacate the District Court's February 13, 2007, and June 25, 2007, orders and remand this case for further proceedings in accordance with this opinion.

NOT PRECEDENTIAL – NOT FOR PUBLICATION

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

UNITED STATES OF AMERICA and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiffs, v. FATHI YUSUF MOHAMMED YUSUF, WALEED MOHAMMED HAMED, WAHEED MOHAMMED HAMED, MAHER FATHI YUSUF, ISAM MOHAMAD YOUSUF, and UNITED CORPORATION, dba Plaza Extra Supermarkets, Defendants.	CRIM NO. 2005-0015

MEMORANDUM OPINION

Finch, J.

THIS MATTER comes before the Court on Defendants' Motion to Strike Counts from the Third Superseding Indictment. Defendants seek dismissal of Counts 1, 22, 55 and 76 as multiplicitous; Counts 3 through 43, 44 through 52, as both failing to state claims under the respectively charged statutes and contrary to the Department of Justice policy; Counts 53, 54, 56 through 74, 75 and 77 and Criminal

Forfeiture Allegations 1 and 2 as failing to state claims under the respectively charged statutes; and the conspiracy counts as insufficiently pled. The Government opposes such motion. A hearing was held on such motion on June 6, 2005.

I. Motion to Dismiss Counts 1, 22, 55, and 76 as Multiplicitous

At this stage in the litigation, whether any counts in the Indictment are multiplicitous is irrelevant. As the Supreme Count stated in *Ohio v. Johnson,* 467 U.S. 493, 500 (1984), "[w]hile the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution." "The consistent practice in this Circuit to remedy multiplicitous convictions that may implicate the Double Jeopardy clause is to require trial judges to impose a general sentence for all of said convictions." *United States v. Blyden*, 930 F.2d 323, 328 (3d Cir. 1991). Therefore, the Court will not strike Counts 1, 22, 55, or 76 as multiplicitous before trial.

II. Motion to Dismiss Counts 3 through 43 for Failure to State Claims and as Contrary to Department of Justice Policy

Counts 3 through 43 charged forty-one counts of mail fraud in violation of 18 U.S.C. § 1341 against Defendants Fathi Yusuf, Waheed Hamed and Waleed Hamed for mailing allegedly false monthly gross receipt tax returns (Forms 720) to the Virgin Islands Bureau of Internal Revenue. "Under 18 U.S.C. § 1341, a person is guilty of mail fraud if, 'having devised or intending to devise any scheme or artifice to defraud,' and 'for the purpose of executing such scheme or artifice or attempting so to do,' he 'knowingly causes to be delivered by mail or [interstate] carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any . . . matter or thing.'" *United States v. Al-Ame*, 434 F.3d 614, 616 (3d Cir. 2006). Defendants argue that charges must be dismissed because; (1) the use of a mail fraud charge with a tax violation is improper and contrary to Congressional intent; (2) routine mailings required by law which take place during the course of a fraudulent scheme are not sufficiently related to the scheme to support a mail fraud prosecution; and (3) under United States Department of Justice policy, cases based on the submission of false or fraudulent returns should be brought under the applicable Internal Revenue Code provisions.

That the submission of false tax returns is specifically covered by 26 U.S.C. § 7206 and in the Virgin

Islands by 14 V.I.C. § 1525 does not preclude prosecution under 18 U.S.C. § 1341. "[T]he tax code is not the exclusive regime under which tax fraud schemes may be prosecuted." *United States v. Dale*, 991 F.2d 819, 849 (D.C. Cir. 1993). For example in *United States v. Miller*, 545 F.2d 1204, 1216 (9th Cir. 1976), both mail fraud and tax fraud convictions were upheld against a defendant who signed false tax returns and submitted them to the IRS through the mails.

Defendants rely on *United States v. Henderson*, 386 F. Supp. 1048, 1052-53 (S.D.N.Y. 1974) for the proposition that schemes aiding [sic] at defrauding the government of taxes do not fall within the scope of the mail and wire fraud statutes. Like the court in *Miller*, 545 F.2d at 1216 n.17, this Court rejects the holding in *Henderson*. *See also United States v. Fountain*, 357 F.3d 250, 258 (2d Cir. 2004) (noting that *Henderson* is the only court to have held that tax fraud crimes against the government cannot be constituted under the mail fraud statute and that it has been rejected).

"'[T]he use of the mails need not be an essential element of the scheme' in order to constitute mail fraud; rather, it is 'sufficient for the mailing to be incident to an essential part of the scheme or a step in [the] plot.'" *Al-Ame*, 434 F.3d at 616 (quoting *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989)). "[T]he Supreme Court has definitively rejected the assertion that routine or innocent mailings are *per se* excluded from the scope of 18 U.S.C. § 1341." *Id.* at 617 (citing *Schmuck*, 489 U.S. at 714-15). The

mailings in this case, though in compliance with internal revenue procedure, were not a direct product of any legal duty, but were derivative of Defendants' alleged scheme to obtain money and property belonging to the Virgin Islands in the form of territorial gross receipts tax revenue. *See Schmuch* [sic], 489 U.S. at 713 (distinguishing *Parr v. United States*, 363 U.S. 370, 387, 391 (1960)). Thus, the mailings are sufficiently related to the alleged scheme to support a mail fraud prosecution.

Finally, as to Defendants' argument that the decision to charge Defendants with mail fraud constitutes an abuse of prosecutorial discretion, the Court relies "on the basic precept that a prosecutor's charging decision is presumptively lawful and that courts must be cautious not to intrude unduly in the broad discretion given to prosecutors in making charging decisions. That the Department of Justice has developed an internal protocol for exercising discretion and channeling prosecutorial resources does not provide license for courts to police compliance with that protocol, and it is well established that . . . internal prosecutorial protocols do not vest defendants with any personal rights." *United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003) (citation and quotations omitted); *see also United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."). A nonconformance with the Department of Justice policy or protocol regarding the decision to

charge Defendants with mail fraud would not license the Court to strike the mail fraud counts.

III. Motion to Dismiss Counts 44 through 52 as Failing to State a Claim and as Contrary to Department of Justice Policy

Counts 44 through 52 charge four counts of money laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i) against Fathi Yusuf and five counts of money laundering against Waleed Hamed. Count 2 alleges a money laundering conspiracy for conspiring to violate 1956(a)(2)(B)(i). Section 1956(a)(2)(B)(i) provides:

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States . . . (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer

> whichever is greater, or imprisonment for not more than twenty years, or both.

The Third Superseding Indictment further specifies that the "specified unlawful activity" is mail fraud in violation of 18 U.S.C. § 1341. Fathi Yusuf and Waleed Hamed allegedly engaged in tax evasion by sending false monthly gross tax returns through the postal service to the Bureau of Internal Revenue. The Court assumes that this is the mail fraud to which the Third Superseding Indictment refers.

Defendants contend that a tax savings resulting from filing false tax returns does not "represent the proceeds of some form of unlawful activity," and that, therefore, Counts 44 through 52 fail to state an offense. In the Third Circuit, "'proceeds' as that term is used in § 1956 means simply gross receipts from illegal activity.'" *United States v. Grasso*, 381 F.3d 160, 169 (3d Cir. 2004). "'[P]roceeds' are something which is obtained in exchange for the sale of something else as in, most typically, when one sells a good in exchange for money." *United States v. Maali*, 358 F. Supp.2d 1154, 1158 (M.D. Fla. 2005). The Court agrees with the final analysis in *Maali*, that "[h]aving ascertained the plain and ordinary definition of 'proceeds,' it is clear that the term does not contemplate profits or revenue indirectly derived . . . from the failure to remit taxes." *Id.* at 1160. The cost savings theory was also rejected in *Anderson v. Smithfield Foods Inc.*, 290 F. Supp.2d 1270, 1275 (M.D. Fla. 2002):

> The money that Defendants allegedly illegally obtained to violate RICO and environmental laws, and to allegedly commit mail and wire fraud, was money that Defendants legally obtained through the operation of its business. Saving money as a result of the alleged noncompliance with the requirements of an environmental statute does not make the money illegally obtained for the purposes of the money laundering statute.

The mailing of the allegedly false gross tax returns did not result in proceeds, as that term is commonly interpreted. Accordingly, Counts 44 through 52 are dismissed for failure to state an offense. Count 2, charging a money laundering conspiracy, is dismissed for the same reasons.

IV. Motion to Dismiss Counts 56 through 76 for Failure to State Claims under 26 U.S.C. § 7206(2)

Counts 61 through 65, 66 through 70, and 71 through 74 charge Defendants Fathi Yusuf, Waleed Hamed and Waheed Hamed, respectively, with aiding and assisting in filing their own false income tax returns in violation of 26 U.S.C. § 7206(2). Defendants contend that aiding and assisting in the filing of their own false income tax returns does not violate 26 U.S.C. § 7206(2).

Title 26 U.S.C. § 7206(2) provides:

> Any person who . . . [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . . shall be guilty of a felony.

A taxpayer who prepares his own false tax return without aiding or assisting another such as a tax preparer, accountant, or attorney, cannot be found to have violated this statute, because of course, a person cannot aid or assist himself. However, once the taxpayer provides false information to another, such as a tax preparer, accountant, or attorney, to aid or assist the other in preparing the taxpayer's own false tax return, the taxpayer is aiding or assisting in the presentation of a false tax return, notwithstanding the lack of knowledge of the other and notwithstanding that the false information is supplied for the purpose of inclusion in his own tax return. *See United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983); *see also Baker v. United States*, 401 F.2d 958 (D.C. Cir. 1968) (taxpayer prosecuted under s [sic] 7206(2) for assisting another to falsify his own tax return). Therefore, Counts 61 through 74 are not subject to dismissal on this ground.

Defendants also argue that because they filed their tax returns with the Virgin Islands Bureau of Internal Revenue, rather than the Internal Revenue Service, they could not have violated 26 U.S.C. § 7206(2). Section 7206(2) applies to the presentation of a document "under, or in connection with any matter arising under, the internal revenue laws." Title 26 U.S.C. § 932(c)(2) specifically requires that residents of the Virgin Islands file income tax returns with the Virgin Islands Bureau of Internal Revenue. Therefore, Defendants' tax returns constitute a document presented in connection with a matter arising under the internal revenue laws.

Finally, Defendants consider Counts 56 through 74 to be vague. A defendant is entitled to an indictment that states all of the elements of the offense charged, informs him of the nature of the charge so that he may prepare a defense, and protects him from double jeopardy by enabling him to plead the judgment as a bar to any later prosecution for the same offense. *Russell v. United States*, 369 U.S. 749, 763-764 (1962). "The essential elements of an offense under section 7206(2) are (1) that defendant aided, assisted, procured, counseled, advised or caused the preparation and presentation of a return; (2) that the return was fraudulent or false as to a material matter; and (3) that the act of the defendant was willful." *United States v. Gambone*, 314 F.3d 163, 174 (3d Cir. 2003). Title 33 V.I.C. § 1525(2), charged in counts 56 through 60, is identical to 26 U.S.C. § 7206(2) and shares the same essential elements.

Counts 56 through 74 plead these essential elements. All of these counts allege that the respective Defendants filed returns which they did not believe to be true. The counts specify the amount of income reported by the Defendants for each of the years in question and allege that the Defendants' income for each of those years exceeded the amount reported. These allegations are sufficiently definite to overcome a vagueness challenge. *See United States v. McDonnell*, 696 F. Supp. 356, 361 (N.D. Ill. 1988).

In *McDonnell*, the defendant similarly argued that the counts were deficient because they did not specify the total amount of income that the Government theorized that the defendant should have reported. *Id.* The court held: "Such evidentiary detail, however, is not required." *Id.* The court further recognized that the Government's summaries, charts and financial analyses that would be produced pretrial, "coupled with the information contained in the indictment, sufficiently apprises the defendant of the charges against him in the tax counts so that he may adequately prepare a defense." *Id.* As in *McDonnell*, the Government will be producing its final summary schedule pretrial so that Defendants may adequately prepare their defenses. *See* Order dated May 27, 2005, Docket No. 491.

Counts 56 through 74 are not so vague as to render Defendants unable to protect themselves from subsequent prosecutions for the same offense, "particularly when it is remembered that they could rely upon other parts of the present record in the event

that future proceedings should be taken against them." *Russell*, 369 U.S. at 764. The counts as well as the trial record will clearly indicate the tax years and returns involved. There is little danger that Defendants will be prosecuted again for the same violations. *See United States v. Harrold*, 796 F.2d 1275, 1278 (10th Cir. 1986).

V. Motion to Dismiss Count 75 for Failure to State a Claim, under 14 V.I.C. § 605(a) and as Otherwise Contrary to Department of Justice Policy.

Count 75 charges Defendants Fathi Yusuf, Waheed Hamed, Waleed Hamed and United with violating 14 V.I.C. § 605(a), the Criminally Influenced and Corrupt Organization statute (CICO), which makes it "unlawful for any person employed by, or associated with, any enterprise, as that term is defined herein, to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity." "'Criminal activity'" means engaging in . . . offenses, violations or the prohibited conduct as variously described in the laws governing this jurisdiction including any Federal criminal law, the violation of which is a felony and, in addition, those crimes, offenses, violations or prohibited conduct as found in the Virgin Islands Code as follows: . . . (37) Title 33, chapter 45, Virgin Islands Code, relating to offenses and forfeitures under Taxation and Finance." 14 V.I.C. § 604(e)(37).

Count 75 identifies Counts 1, 2, 3, 15, 27, 39, and 55-60 as constituting the pattern of criminal activities. Defendants contend that Counts 55-60 do not constitute proscribed criminal activities under 14 V.I.C. § 605(a), that Counts 1 and 2 are multiplicitous, and that Counts 3, 15, 27, and 39, alleging mail fraud based on mailing a false tax return should not be considered predicate acts for a racketeering offense under United States Department of Justice policy.

Counts 55 and 56 through 60 allege violations of 33 V.I.C. §§ 1522 and 1525(2), respectively, both of which relate to tax offenses. Therefore, they constitute criminal activities for the purposes of 14 V.I.C. § 605(a). As discussed in Part I, with regard to Counts 1 and 2, multiplicity is not an issue that the Court reaches pretrial. Finally, the United States Department of Justice policy was formulated based on its interpretation of the parallel, but not identical federal statute, 18 U.S.C. § 1962(c), Racketeer Influenced and Corrupt Organizations Act (RICO). These two statutes are materially different in that the Virgin Islands statute expressly includes tax offenses as a predicate criminal activity and the federal statute does not. Thus, even if the United States Department of Justice policy were binding, it would not be binding as to a prosecution under the Virgin Islands statute, 14 V.I.C. § 605(a).

VI. Motion to Dismiss Counts 53, 54 and 77 for Failure to State Claims under 31 U.S.C. § 5324(a)(3) and (d)(2).

In Counts 53, 54, and 77, Waheed Hamed, Maher Yusuf, and Nejeh F. Yusuf, respectively, are charged with structuring financial transactions in violation of 31 U.S.C. § 5324(a)(3) and (d)(2) and 18 U.S.C. §§ 2 and 3551 *et seq*. Section 5324(d)(2) is a sentence enhancement provision which provides: "Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of title 18, United States Code, imprisoned for not more than 10 years, or both." Counts 53 and 54 charge Waheed Hamed and Maher Yusuf, with violating another law of the United States, to wit 18 U.S.C. § 1956(h), which is money laundering. The money laundering is premised on the proceeds of the mail fraud allegedly committed by mailing false tax returns. As discussed in dismissing Counts 44 through 52, tax savings through tax evasion does not constitute a proceed under the money laundering statute. Accordingly, the reference to 18 U.S.C. § 1956(h) in Counts 53 and 54 is stricken.

VII. Motion to Dismiss Criminal Forfeiture Allegation 1 for Failure to State a Claim under 18 U.S.C. § 982

Defendants move to dismiss Criminal Forfeiture Allegation 1 as not identifying proceeds or how such proceeds were used to acquire the property identified. Rule 7(c)(2) of the Federal Rules of Criminal Procedure requires only that "the indictment . . . provide[] notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute." "Barebones pleading suffices so long as it puts the defendant on notice that the government seeks forfeiture and identifies the assets subject to forfeiture with sufficient specificity to permit the defendant to marshal evidence in their defense." *United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983). As long as the indictment alleges the "extent of the interest or property subject to forfeiture," it is sufficient. *United States v. Boffa*, 688 F.2d 919, 939 (3d Cir. 1982) (quotation omitted).

Criminal Forfeiture Allegation 1 identifies each piece of property subject to forfeiture and the connection between the property and criminal activity. However, Counts 66 through 71 connect the property for which the Government seeks forfeiture to violations of 18 U.S.C. § 1956 – money laundering. In Part III, the Court held that the money laundering counts cannot stand because a tax savings cannot be considered a "proceed" of the illegal activity of mail fraud. Accordingly, the Court also dismisses Counts 66 through 71 of Criminal Forfeiture Allegation 1.

VIII. Motion to Dismiss Criminal Forfeiture Allegation 2 for Failure to State Claims under 14 V.I.C. § 606.

Title 14 V.I.C. § 606 is the territorial criminal forfeiture statute. Defendants' posit that since Counts 75 and 76, the CICO counts, should be dismissed and Criminal Forfeiture Allegation 2 falls in the absence of these counts, Criminal Forfeiture Allegation 2 must be dismissed. The counterpoint holds true here. Because the Court dismissed neither Count 75 nor Count 76, there is no reason for the dismissal of Criminal Forfeiture Allegation 2.

IX. Motion to Dismiss the Conspiracy Counts as Insufficiently Pled

Defendants move the Court to dismiss the remaining conspiracy counts as insufficient to apprise them of the charges against them.

> An indictment is generally deemed sufficient if it: 1) contains the elements of the offense intended to be charged, 2) sufficiently apprises the defendant of what he must be prepared to meet, and 3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution. It is equally well established that no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double

> jeopardy in the event of a subsequent prosecution.

United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989).

The Court has reviewed the conspiracy counts and finds that they meet the level of specificity required by the Third Circuit Court of Appeals.

X. Conclusion

For the foregoing reasons, Defendants' Motion to Strike Counts from the Third Superseding Indictment is denied, except for the money laundering counts, Counts 2 and 44-52 which are dismissed, as well as Counts 66 through 71 of Criminal Forfeiture Allegation 1. In addition, the reference to 18 U.S.C. § 1956(h) in Counts 53 and 54 is stricken.

ENTER:

DATED: February 13, 2007 /s/ *Raymond Finch*
RAYMOND L. FINCH
DISTRICT JUDGE

ATTEST:
Wilfredo F. Morales
Clerk of Court

by: /s/ *Margaret Brown*
Deputy Clerk

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**IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiffs, v. FATHI YUSUF MOHAMMED YUSUF, WALEED MOHAMMED HAMED, WAHEED MOHAMMED HAMED, MAHER FATHI YUSUF, ISAM MOHAMAD YOUSUF, and UNITED CORPORATION, dba Plaza Extra Supermarkets, Defendants.	CRIM NO. 2005-0015

ORDER

(Filed Feb. 13, 2007)

THIS MATTER comes before the Court on Defendants' Motion to Strike Counts from the Third Superseding Indictment. Defendants seek dismissal of Counts 1, 22, 55 and 76 as multiplicitous; Counts 3 through 43, 44 through 52, as both failing to state claims under the respectively charged statutes and contrary to the Department of Justice policy; Counts 53, 54, 56 through 74, 75 and 77 and Criminal Forfeiture Allegations 1 and 2 as failing to state claims under the respectively charged statutes; and the

conspiracy counts as insufficiently pled. The Government opposes such motion. A hearing was held on such motion on June 6, 2005.

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Motion is **DENIED,** except for the money laundering counts, Counts 2 and 44-52, as well as Counts 66 through 71 of Criminal Forfeiture Allegation 1, which are **DISMISSED** and the reference to 18 U.S.C. § 1956(h) in Counts 53 and 54 which is **STRICKEN**.

ENTER:

DATED: February 13, 2007 /s/ *Raymond L. Finch*
RAYMOND L. FINCH
DISTRICT JUDGE

ATTEST:
Wilfredo F. Morales
Clerk of Court

by: /s/ *Margaret Brown*
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NOT FOR PUBLICATION – NOT PRECEDENTIAL

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

UNITED STATES OF AMERICA and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiffs, v. FATHI YUSUF MOHAMMED YUSUF, WALEED MOHAMMED HAMED, WAHEED MOHAMMED HAMED, MAHER FATHI YUSUF, ISAM MOHAMAD YOUSUF, and UNITED CORPORATION, dba Plaza Extra Supermarkets, Defendants.	CRIM NO. 2005-0015

MEMORANDUM OPINION

(Filed Jun. 25, 2007)

Finch, J.

THIS MATTER comes before the Court on the Government's Motion for Reconsideration. The United States of America moves for reconsideration from that part of the Court's February 13, 2007 Memorandum Opinion (#689) and Order (#690) that dismissed Counts 2 and 44-52, dismissed paragraphs 66-71 within Criminal Forfeiture Allegation 1, and

struck the reference to 18 U.S.C. § 1956(h) in Counts 53 and 54. This part of the Court's ruling was predicated on the Court's holding that the term "proceeds" as used in the money laundering statute, 18 U.S.C. § 1956(a)(2)(B)(i), "does not contemplate profits or revenue indirectly derived . . . from the failure to remit taxes." Mem. Op., dated Feb. 13, 2007, at 6 (quoting *United States v. Maali*, 358 F. Supp.2d 1154, 1160 (M.D. Fla. 2005)).

The Government raises the issue in its Motion for Reconsideration as to whether United Corporation's funds, in the possession of the individual Defendants, Fathi Yusuf and Waleed Hamed, without having been distributed or paid, constitute "proceeds" for purposes of the money laundering statute.

United Corporation is a closely held corporation of which Fathi Yusuf is a 32.5% shareholder. Waleed Hamed is not a shareholder. Relying on *Kann v. C.I.R.*, 210 F.2d 247, 251 (3d Cir. 1954), the Court finds that any funds held by Fathi Yusuf, as a controlling shareholder of United Corporation, absent any allegation that Fathi Yusuf intended to steal from United Corporation or the other shareholders, do not constitute embezzled income. Thus, the money that Fathi Yusuf held was money that was legally obtained through the operation of United Corporation and was not criminally held by him. Saving legitimately-earned money by mailing a false individual tax return, does not change the nature of the money retained to money illegally obtained for the purposes of the money laundering statute.

Waleed Hamed, on the other hand, not being a shareholder of United Corporation, but only a salaried employee, had no right to possess funds of United Corporation, except the money paid to him as compensation. In his possession, funds diverted from United Corporation could represent embezzled funds. The proceeds of the mail fraud would not therefore be tax savings on legally obtained funds, but the retention of embezzled funds. Mailing of false individual tax returns that do no [sic] report embezzled funds, but rather conceal these embezzled funds, and transporting and transferring such proceeds outside the United States would constitute money laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i).

However, the Third Superseding Indictment does not allege that Waleed Hamed embezzled any funds from United Corporation or otherwise obtained the funds from United Corporation without United Corporation's leave. In fact, the Third Superseding Indictment alleges to the contrary, that United Corporation specifically endorsed Waleed Hamed's control of such funds, in a scheme to reduce its tax obligation. There is no allegation that it was criminal for Waleed Hamed to possess such funds. Therefore, the money retained by Waleed Hamed by mailing a false individual tax return was not money illegally obtained or "proceeds" for the purposes of the money laundering statute, but rather, tax savings.

For the foregoing reasons, the Court denies the Government's Motion for Reconsideration.

ENTER:

DATED: June 25, 2007 /s/ *Raymond L. Finch*
RAYMOND L. FINCH
DISTRICT JUDGE

ATTEST:
Wilfredo F. Morales
Clerk of Court

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3308

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS,

Appellants

v.

FATHI YUSUF MOHAMMED YUSUF a/ka [sic] FATHI YUSUF; WALEED MOHAMMED HAMED a/k/a WALLY HAMED; WAHEED MOHAMMED HAMED a/k/a WILLIE YUSUF; MAHER FATHI YUSUF a/k/a MIKE YUSUF; ISAM MOHAMAD YOUSUF a/k/a SAM YOUSEF; UNITED CORPORATION, d/b/a PLAZA EXTRA; NEJEH FATHI YUSUF

Before: SCIRICA, *Chief Judge*,
SLOVITER, McKEE, RENDELL, BARRY,
AMBRO, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN, HARDIMAN,
NYGAARD* and ROTH*, *Circuit Judges*

The petition for panel rehearing and rehearing *en banc* filed by the Appellees in the above-entitled case

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* Judge Nygaard's vote and Judge Roth's vote are limited to panel rehearing only.

having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: September 2, 2008

CH/cc: Gordon C. Rhea, Esq.
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Alan Hechtkopf, Esq.

No. 08-981

In the Supreme Court of the United States

FATHI Y.M. YUSUF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE GOVERNMENT OF THE VIRGIN ISLANDS IN OPPOSITION

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QUESTION PRESENTED

Whether a mail fraud scheme to defraud the United States Virgin Islands of taxes due on gross receipts, in violation of 18 U.S.C. 1341, generates "proceeds" within the meaning of 18 U.S.C. 1956(a)(2)(B)(i), the international money laundering statute.

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In the Supreme Court of the United States

No. 08-981

FATHI Y.M. YUSUF, ET AL., PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE GOVERNMENT OF THE VIRGIN ISLANDS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 536 F.3d 178. The opinion of the district court (Pet. App. 27-47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2008. A petition for rehearing was denied on September 2, 2008 (Pet. App. 52-53). On November 25, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 30, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, a corporation and five individuals, are charged with mail fraud, in violation of 18 U.S.C. 1341; money laundering involving the proceeds of the mail fraud, in violation of 18 U.S.C. 1956(a)(2)(B)(i); and various other criminal offenses under the laws of the United States and the United States Virgin Islands (USVI). The district court entered a pre-trial order dismissing the money laundering charges. Pet. App. 27-47. The court of appeals vacated the district court order and remanded for further proceedings. *Id.* at 1-26.

1. Because the district court dismissed the indictment before trial, the following facts are drawn from the allegations of the indictment. Petitioner United Corporation (United) is a family-owned business that operates Plaza Extra Supermarkets, a chain of three stores located on St. Thomas and St. Croix in the USVI. Petitioner Fathi Yusuf is United's primary owner. Petitioner Maher "Mike" Yusuf, one of Fathi's sons, is a part-owner of United and manages one of the Plaza Extra stores. Petitioners Waheed "Willie" Hamed and Waleed "Wally" Hamed are Fathi's nephews and manage the other two Plaza Extra stores. Petitioner Nejeh Fathi Yusuf is a relative and also participates in the management of the stores. Defendant Isam "Sam" Yousuf is a fugitive and is not a party to the petition. Pet. App. 3; Pet. ii.

Because United conducts business in the USVI, it is obligated to pay to the USVI a four percent tax on its gross receipts. In particular, V.I. Code Ann. tit. 33, § 41(a) (1994) provides, in pertinent part, that "[e]very individual and every firm, corporation, and other association doing business in the [USVI] shall report their gross receipts and pay a tax of four percent (4%) on the

gross receipts of such business." The Virgin Islands Code further provides that a business subject to the payment of gross receipts taxes shall file a return each month and that "[t]he returns and payments required by this subsection shall be due within 30 calendar days following the last day of the calendar month concerned." V.I. Code Ann. tit. 33, § 44(c) (Supp. 2008).

In July, 2001, the Federal Bureau of Investigation (FBI) received a suspicious activity report (SAR) from the Bank of Nova Scotia in St. Thomas reporting suspicious financial transactions involving United. The SAR stated that, during the four-day period from April 16, 2001, through April 19, 2001, $1,920,000 in currency, in denominations of $50 and $100 bills, was deposited into United's account at the bank. The FBI commenced an investigation, which revealed that petitioners had conspired to avoid reporting $60 million of the supermarkets' gross receipts on United's monthly USVI gross receipts tax returns and had failed to pay to the Government of the Virgin Islands the tax owed on the unreported gross receipts. The investigation further revealed that petitioners had engaged in various efforts to disguise and to conceal their illegal scheme and its proceeds. Pet. App. 4-5.

In September 2004, a grand jury in the USVI returned a third superseding indictment (Indictment) charging petitioners with criminal offenses arising out of the scheme. The Indictment charges that, after the supermarkets' receipts were collected each day, the funds typically were transferred to a room called the "cash room," to which only certain individuals, including petitioners, were permitted access. In the cash room, supermarket employees counted the receipts and prepared bank deposit slips. At petitioners' directions, em-

ployees withheld from deposit substantial amounts of cash received from sales, typically in denominations of $100, $50, and $20. That cash was instead delivered to one of the individual petitioners or placed in a designated safe in the cash room. From 1996 through 2001, tens of millions of dollars in cash was withheld from deposit in this manner and was not reported as gross receipts on tax returns filed by United using the United States mail. Pet. App. 4 n.2, 5, 7; Indictment para. 12.

The Indictment further alleges that petitioners engaged in various efforts to disguise and to conceal the illegal scheme and its proceeds. For example, petitioners purchased, and directed the supermarkets' employees and others to purchase, cashier's checks, traveler's checks, and money orders with unreported cash, typically from different bank branches and made payable to individuals and entities other than petitioners, in order to disguise the cash as legitimate financial instruments. Petitioners structured the amounts of the checks and money orders to evade the legal requirement that banks keep records and file reports of cash transactions with the United States Department of the Treasury. Petitioners then caused the checks and money orders to be deposited into foreign bank accounts controlled by the individual petitioners. Pet. App. 5 & n.3, 6 & n.6, 7-8; Indictment paras. 15-22, 35, 37.

The Indictment charges petitioners with conspiracy to commit mail fraud and to structure financial transactions in order to evade reporting requirements, in violation of 18 U.S.C. 371; conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); mail fraud, in violation of 18 U.S.C. 1341; international money laundering, in violation of 18 U.S.C. 1956(a)(2)(B)(i)); structuring financial transactions to evade reporting require-

ments, in violation of 31 U.S.C. 5324(a)(3) and (d)(2); causing the filing of false tax returns, in violation of 26 U.S.C. 7206(2); obstruction of justice, in violation of 18 U.S.C. 1503; and various offenses in violation of USVI law. The indictment also contains an asset forfeiture allegation, pursuant to 18 U.S.C. 982, and an asset forfeiture allegation pursuant to USVI law. Pet. App. 5 & n.5.

As relevant here, Counts 44 through 52 of the Indictment allege substantive international money laundering offenses, in violation of 18 U.S.C. 1956(a)(2)(B)(i). That provision criminalizes the transportation of "a monetary instrument or funds from a place in the United States to or through a place outside the United States * * * knowing that the monetary instrument or funds involved in the transportation * * * represent the proceeds of some form of unlawful activity and knowing that such transportation * * * is designed in whole or in part * * * to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *Ibid.*[1]

The Indictment alleges that petitioners violated Section 1956(a)(2)(B)(i) by transporting funds from the USVI to Amman, Jordan, knowing that the funds in-

[1] Count 2 of the Indictment alleges a conspiracy to commit the offenses charged in Counts 44-52, in violation of 18 U.S.C. 1956(h), which criminalizes conspiring to commit any substantive offense defined in Section 1956. Indictment para. 28. Paragraphs 66 through 71 of the Indictment allege that proceeds of the money laundering offenses should be forfeited to the United States under 18 U.S.C. 982. Because both the district court and the court of appeals determined that the validity of those charges depends on the validity of the substantive money laundering charges, Pet. App. 8, 34, 41, the government does not discuss the money laundering conspiracy and forfeiture charges independently in this brief.

volved the proceeds of the specified unlawful activity of mail fraud. Indictment para. 33; see 18 U.S.C. 1956(c)(7)(A) (defining "specified unlawful activity" to include offenses listed in 18 U.S.C. 1961(1)); 18 U.S.C. 1961(1) (listing the offense of mail fraud, in violation of 18 U.S.C. 1341). The indictment alleges that petitioners committed mail fraud by defrauding the USVI of gross receipts tax revenue belonging to the USVI through the mailing of false USVI tax returns that understated the amount of United's gross receipts. Indictment paras. 30-31.

2. Petitioners filed a pre-trial motion to dismiss the money laundering charges, contending that "tax savings" resulting from filing false returns do not "represent the proceeds of some form of unlawful activity" within the meaning of the money laundering statute. Pet. App. 8. The district court granted the motion. *Id.* at 32-34, 43. The court reasoned that the "'[p]roceeds' are something which is obtained in exchange for the sale of something else as in, most typically, when one sells a good in exchange for money." *Id.* at 33 (quoting *United States* v. *Maali*, 358 F. Supp. 2d 1154, 1158 (M.D. Fla. 2005), aff'd *sub nom. United States* v. *Khanani*, 502 F.3d 1281 (11th Cir. 2007)). Under that definition, the court concluded, "it is clear that the term does not contemplate profits or revenue indirectly derived . . . from the failure to remit taxes." *Ibid.* (quoting *Maali*, 358 F. Supp. 2d at 1160).[2]

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[2] For the same reason, the district court also dismissed the charge of conspiracy to commit money laundering, struck from two structuring counts the sentence-enhancing allegations grounded upon money laundering, and dismissed the paragraphs of a criminal forfeiture allegation which were grounded upon money laundering. Pet. App. 33, 41, 43. As discussed in note 1, *supra*, because the lower courts viewed those

The government filed a motion for reconsideration, pointing out that, even assuming the district court was correct that "tax savings" fraudulently retained by a taxpayer do not constitute "proceeds" for purposes of the money laundering statute, the indictment charges that the tax revenue at issue was deposited into non-corporate financial accounts controlled by the individual petitioners, in whose hands, the government argued, the funds were neither "retained" nor "tax savings." See Pet. App. 49-50. The district court denied the government's motion, reiterating the court's view that "[s]aving legitimately-earned money by mailing a false individual tax return does not change the nature of the money retained to money illegally obtained for the purpose of the money laundering statute." *Id.* at 49.

3. The court of appeals vacated the district court's orders and remanded for further proceedings. Pet. App. 1-26. The court of appeals first observed that no one disputed that the indictment sufficiently alleges mail fraud based on the mailing of false gross receipts tax returns. *Id.* at 11; see *Pasquantino* v. *United States*, 544 U.S. 349, 356 (2005) (upholding wire fraud charges based on scheme to deprive Canada of its entitlement to excise taxes on imported liquor because that deprivation inflicted "an economic injury no less than had [the defendants] embezzled the funds from the Canadian treasury"). The court also noted that no one disputed that mail fraud may be a predicate offense for a charge of international money laundering. Pet. App. 11. "The narrow issue," the court stated, "is whether unpaid taxes unlawfully disguised and retained by means of the filing

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charges as dependent on the validity of the substantive money laundering charges, this brief does not independently address their validity.

of false tax returns through the U.S. mail are 'proceeds' of mail fraud for purposes of sufficiently stating an offense for money laundering." *Id.* at 12.

The court of appeals rejected the district court's view "that to qualify as 'proceeds' under the federal money laundering statute, funds must have been *directly* produced by or through a specified unlawful activity." Pet. App. 14. Instead, the court of appeals held "that funds *retained* as a result of the unlawful activity can be treated as the 'proceeds' of such crime." *Ibid.* The court explained that, although the money laundering statute does not define what constitute "proceeds" of specified unlawful activity, the statute identifies a broad array of offenses that constitute "specified unlawful activity," and those offenses include crimes that produce "proceeds" only if that term encompasses property that is unlawfully retained. *Id.* at 13. "For example," the court noted, "the fraudulent *concealment* of a bankruptcy estate's assets is categorized as a "specified unlawful activity." *Ibid.* (citing 18 U.S. 152(1)). Under Section 152(1), the court stated, "property which is required to be included in a bankruptcy debtor's estate but is instead undeclared, and thus *retained*, is 'proceeds' of a bankruptcy fraud offense." *Ibid.*

Applying that understanding of the term "proceeds" to petitioners' offenses, the court of appeals held that "unpaid taxes, which are unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail, constitute 'proceeds' of mail fraud for the purposes of supporting a charge of federal money laundering." Pet. App. 23. The court explained that petitioners' "fraudulent scheme was that of concealing certain gross receipts from the Virgin Islands government through the mailing of fraudulent tax returns in order to

defraud, cheat, and deprive the government of the 4% gross receipts taxes it was owed, thus enabling [petitioners] to unlawfully retain such government property and profit from their scheme." *Ibid.* In the court's view, "the unpaid taxes, unlawfully disguised and retained through the mailing of the tax forms, were 'proceeds' of [petitioners'] overall scheme to defraud the government." *Id.* at 25.

The court of appeals stressed that its conclusion was consistent with *United States* v. *Santos*, 128 S. Ct. 2020 (2008), which ruled that, in a prosecution under 18 U.S.C. 1956(a)(1)(A)(i) for laundering the "proceeds" of an illegal gambling business in violation of 18 U.S.C. 1955, "proceeds" means the profits, rather than the gross receipts, of the criminal enterprise. See *Santos*, 128 S. Ct. at 2026 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment). The court observed that, "[b]y intentionally misrepresenting the total amount of Plaza Extra Supermarkets' gross receipts through the mailing of fraudulent tax returns, [petitioners] were able to secretly 'pocket' the 4% gross receipts taxes on the unreported amounts which were the property of the [USVI]." Pet. App. 25. "Other than some small expenses incurred in perpetuating the mail fraud," the court explained, "the unpaid taxes retained by [petitioners] amount to profits" of the fraud, which petitioners subsequently laundered when they sent the money abroad. *Id.* at 25-26.

ARGUMENT

Petitioners contend (Pet. 10-24) that their alleged mail fraud scheme to deprive the USVI of gross receipts taxes to which it was entitled did not generate "proceeds" that petitioners could launder in violation of 18

U.S.C. 1956(a)(2)(B)(i). That issue does not warrant this Court's review at this time.

1. The court of appeals vacated the district court's dismissal of the money laundering charges against petitioners and remanded the case to the district court for a trial on those and other pending charges. Pet. App. 26. The court of appeals' decision is therefore interlocutory, a posture that "of itself alone furnishe[s] a sufficient ground" for the denial of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); see also *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

The interlocutory character of the court of appeals' decision provides a particularly sound reason for denying review under the circumstances of this case. Petitioners have yet to be tried on the money laundering charges. If petitioners are ultimately acquitted following a trial on the merits, the claim that they raise in their petition will be moot. Because it may prove unnecessary for this Court to address petitioners' claim, it would be premature for the Court to grant the petition.

2. Review by this Court would be premature at this time for an additional reason. Congress is currently giving serious consideration to legislation that, if enacted, would remove any possible doubt that fraudulently retained tax revenues constitute "proceeds" under the money laundering statute. On February 5, 2009, Senator Leahy and others introduced the Fraud Enforcement and Recovery Act of 2009, S. 386, 111th Cong., 1st Sess. (S. 386). See 155 Cong. Rec. S1681-

S1684 (daily ed.). That bill would, among other things, define the term "proceeds" for purposes of 18 U.S.C. 1956 to mean "any property derived from or obtained *or retained*, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." S. 386, § 2(f)(1)(B), at 5 (as passed by the Senate) (emphasis added). The bill would also expand the prohibition of the international money laundering statute expressly to cover transactions made "with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986," which prohibits tax evasion of the type that petitioners allegedly committed in this case. *Id.* § 2(g)(2), at 6.

On March 23, 2009, the Senate Judiciary Committee favorably reported the legislation. S. Rep. No. 10, 111th Cong., 1st Sess. (2009). And, on April 28, 2009, the bill was approved by the full Senate. See 155 Cong. Rec. at S4777 (daily ed.). If the legislation ultimately becomes law, any decision that this Court might render on the issue raised by petitioners would be of no continuing importance.

3. Petitioners' claim does not warrant this Court's review in any event. The court of appeals held that a mail fraud scheme that defrauds the government of tax revenue produces "proceeds" within the meaning of the international money laundering statute, 18 U.S.C. 1956(a)(2)(B)(i). As the court explained, "[p]roceeds" of mail fraud include "funds *retained* as a result of the unlawful activity" that the perpetrators would otherwise have paid to those entitled to the funds. Pet. App. 14.

The various opinions in *United States* v. *Santos*, 128 S. Ct. 2020 (2008), all recognized that, in ordinary usage, the word "proceeds" has two accepted definitions—(1) the total amount produced by an activity and (2) the

net amount produced after the deduction of associated expenses. See *id.* at 2024 (plurality opinion); *id.* at 2031-2032 (Stevens, J., concurring in the judgment); *id.* at 2036 (Alito, J., dissenting, joined by the Chief Justice and Justices Kennedy and Breyer). Under either of those definitions, "proceeds" includes money unlawfully retained as a result of a crime, as well as money unlawfully generated by the crime. See, *e.g.*, 12 *The Oxford English Dictionary* 544 (2d ed. 1989) (defining "proceeds" as "[t]hat which proceeds, is derived, or results from something," as well as "profit"); *The Random House Dictionary of the English Language* 1542 (2d ed. 1987) (defining "proceeds" as "the total amount derived from a sale or other transaction," as well as "profits or returns"); *Webster's Third New International Dictionary of the English Language* 1807 (1993) (defining "proceeds" as "what is produced by or derived from something," as well as "the net profit made on something").

The view that "proceeds" excludes funds retained by fraud cannot be reconciled with the list of offenses designated as "specified unlawful activity" by the money laundering statute. 18 U.S.C. 1956(c)(7). Several of the listed offenses produce "proceeds" only if that term encompasses property that is unlawfully retained. For example, one listed "specified unlawful activity" is the fraudulent concealment of property during or in contemplation of bankruptcy. 18 U.S.C. 152. The "proceeds" of that offense are the property that the debtor unlawfully retains by hiding it from the bankruptcy court. See Pet. App. 13-14 (citing *United States* v. *Brennan*, 326 F.3d 176, 190 (3d Cir.), cert. denied, 540 U.S. 898 (2003); *United States* v. *Ladum*, 141 F.3d 1328, 1340 (9th Cir.), cert. denied, 525 U.S. 898, and 525 U.S. 1021 (1998); and

United States v. *Levine*, 970 F.2d 681, 686 (10th Cir.), cert. denied, 506 U.S. 901 (1992)).

Petitioners argue that "[t]he property involved in bankruptcy fraud is not 'retained' by the perpetrator in the same way that most unpaid taxes are," because "[a]ll of a debtor's property belongs to the estate once the debtor files for bankruptcy, and by concealing an asset from the trustee and the court the debtor is embezzling it from the bankruptcy estate." Pet. 20. Section 152, however, expressly makes it unlawful for a debtor, "in contemplation of" filing for bankruptcy, to conceal "any of his property." 18 U.S.C. 152(7). A debtor violates that provision by unlawfully concealing and retaining his *own* property before it becomes property of the estate. Moreover, numerous other offenses listed as "specified unlawful activity" produce proceeds when the perpetrator retains property (including import duties) that he technically owns but is under a legal obligation to turn over to the government. See, *e.g.*, 18 U.S.C. 541 (effecting the entry of goods into the United States "by the payment of less than the amount of duty legally due"); 18 U.S.C. 542 (entry of goods by false statements); 18 U.S.C. 545 (smuggling goods into the United States). Similarly, courts have recognized that mail fraud, the "specified unlawful activity" charged in this case, can generate "proceeds" by enabling the perpetrator to retain funds that he owes to the victim of the fraud. See, *e.g.*, *United States* v. *Frank*, 354 F.3d 910, 916-918 (8th Cir. 2004) (upholding money laundering conviction based on transactions with the proceeds of a mail fraud in

which the defendant unlawfully retained a car by failing to disclose it as an asset available to satisfy a restitution order).[3]

The conclusion that unlawfully retained tax revenues can constitute the "proceeds" of mail fraud is also supported by *Pasquantino* v. *United States*, 544 U.S. 349 (2005). In *Pasquantino*, this Court upheld the defendants' convictions for wire fraud based on a scheme to evade Canadian liquor importation taxes, holding that "Canada's right to uncollected excise taxes on the liquor [the defendants] imported into Canada [was] 'property' in its hands" within the meaning of the wire fraud statute. *Id.* at 355. Although the Court had no occasion to address whether the unlawfully retained taxes were "proceeds" within the meaning of the money laundering statute, the Court's reasoning supports that conclusion. The Court noted "the economic equivalence between money in hand and money legally due," *id.* at 356, and stated that the defendants' offense was no different than if "they used interstate wires to defraud Canada not of taxes due, but of money from the Canadian treasury," *id.* at 358. See *id.* at 356 (The defendants' "tax evasion deprived Canada of [taxes they were legally obligated to pay], inflicting an economic injury no less than had they embezzled funds from the Canadian treasury."). Indeed, Justice Ginsburg, in dissent, noted that the Court's hold-

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[3] Even if there were merit to petitioners' argument that unlawfully retained property can constitute proceeds only if it belongs to someone other than the defendant, the argument would not assist the individual petitioners. As the Indictment alleges, the proceeds here are *corporate* funds constituting unpaid *corporate* gross receipts taxes, which funds were transferred from the corporation into financial accounts controlled, in various combinations, by the individual petitioners.

ing would expose defendants who engaged in prohibited transactions with unlawfully retained taxes to penalties under the money laundering statute. *Id.* at 383.

4. Contrary to petitioners' contention (Pet. 10-15), the decision below is not inconsistent with this Court's decision in *Santos*. The issue in *Santos* was whether the term "proceeds" in 18 U.S.C. 1956(a)(1)(A)(i) means the gross proceeds from the underlying unlawful activity or only the profits. A majority of the Court was unable to agree on a definition of "proceeds" for general application. Instead, the Court held only that, in order to establish a violation of 18 U.S.C. 1956(a)(1)(A)(i) based on laundering the "proceeds" of an illegal gambling business in violation of 18 U.S.C. 1955, the government must establish that the alleged laundering transactions involved the profits, rather than the gross proceeds, of the business. See *Santos*, 128 S. Ct. at 2026 (plurality opinion); *id.* at 2033 (Stevens, J., concurring in the judgment).

Because no opinion in *Santos* spoke for the majority of the Court, and none of the various opinions is a "logical subset of other, broader opinions," *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (citation omitted), cert. denied, 540 U.S. 1103 (2004), "the only binding aspect of [the] splintered decision is its specific result," *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 170 (3d Cir.), cert. denied, 528 U.S. 1003 (1999). See *Nichols* v. *United States*, 511 U.S. 738, 745-746 (1994) (noting that, in some cases, there may be "no lowest common denominator or 'narrowest grounds' that represents the Court's holding" under the analysis of *Marks* v. *United States*, 430 U.S. 188 (1977)); *United States* v. *Brown*, 553 F.3d 768, 783 (5th Cir. 2008) ("The precedential value of *Santos* is unclear out-

side of the narrow factual setting of that case."). Thus, because the charges against petitioners rest on a different predicate "specified unlawful activity" (mail fraud rather than operating an illegal gambling business), *Santos* does not resolve the meaning of "proceeds" in this case.

Even assuming that *Santos* establishes that "proceeds" means "profits" for purposes of the money laundering charges against petitioners, their scheme to defraud the USVI of gross receipts taxes produced "profits." As the court of appeals explained, "[o]ther than some small expenses incurred in perpetuating the mail fraud—i.e., the postage stamp affixed to their monthly tax return or any other preparation fees relating to the return—the unpaid taxes retained by [petitioners] amounted to profits." Pet. App. 25.

Petitioners argue (Pet. 12-13) that cases like this one present the same "merger problem" that troubled several Justices in *Santos*—the conduct that establishes the predicate "specified unlawful activity" will virtually always also result in liability for money laundering. See Pet. 19-20 (arguing that the decision below "exposes any taxpayer who knowingly underreports a tax liability on a mailed or e-filed federal income tax return to potential prosecution for * * * money laundering"). That is incorrect. As petitioners themselves concede, a scheme to underpay taxes "does not always require that the tax evader engage in[] transactions resembling money laundering to complete the commission of the offense and achieve its goals." Pet. 12. Although everyone who unlawfully defrauds the government of tax revenue is likely to engage in subsequent transactions with those proceeds, those transactions will result in money laundering in violation of 18 U.S.C. 1956 only if they are

made with the intent to promote specified unlawful activity or for the purpose of concealing the unlawful proceeds or avoiding a transaction reporting requirement. To avoid money laundering liability, therefore, all a fraud defendant must do is refrain from engaging in transactions with those purposes.

The money laundering charges against petitioners arise from actions that are entirely distinct from the conduct that constitutes the proceeds-generating offenses of mail fraud. The mail fraud offenses are based on petitioners' mailing false tax returns to the USVI Bureau of Revenue. The money laundering charges, in contrast, are based on petitioners' transferring funds constituting unpaid tax revenue from the USVI to Jordan for the purpose of concealing the nature, location, source, ownership, or control of the proceeds. The international transfers were neither part of the mail fraud scheme nor necessary for its commission.

Petitioners also err in arguing that "[t]his case provides a suitable opportunity for the Court to resolve at least some of the uncertainty and confusion engendered by" *Santos*. Pet. 10. The uncertainty created by *Santos* concerns when "proceeds" means the total amount produced by a crime and when it means the amount produced less expenses. This case does not present that question. Nor does it present an opportunity to shed any light on the answer to that question because, as discussed above, under either definition, "proceeds" includes money unlawfully retained, as well as money unlawfully generated, as the result of a crime. In any event, it would be premature for the Court to revisit the issue in *Santos* at this time because that issue would, like the issue actually presented in this case, be resolved

if Congress enacts the pending legislation that addresses that issue.

5. Petitioners also contend (Pet. 15-23) that the Court should grant review to resolve a conflict between the decision below and *United States* v. *Khanani*, 502 F.3d 1281 (11th Cir. 2007). Although there is a narrow conflict between the two cases, this Court's resolution of the conflict is not warranted at this time.[4]

In *Khanani*, the defendants, who ran clothing businesses, employed aliens who were not authorized to work in the United States, paid the aliens with undeclared sales revenue, failed to pay them overtime wages, and failed to pay employment taxes to the government. 502 F.3d at 1296. The defendants were

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[4] Petitioners also assert (Pet. 10, 17-18) that the decision below is inconsistent with the position taken by the government more than 15 years ago in *United States* v. *Smith*, No. 92-1612, 1993 WL 346875 (5th Cir. Aug. 11, 1993) (3 F.3d 436 (Table)). In *Smith*, the United States conceded that a mail and wire fraud scheme to deprive the federal government of income taxes did not generate clearly identifiable "proceeds" within the meaning of the money laundering statute. Gov't Br. at 27, *Smith*, *supra* (No. 92-1612). Nevertheless, the government has pursued prosecutions under the theory endorsed by the court below since at least 1997. See, *e.g.*, *United States* v. *Fountain*, 357 F.3d 250 (2d Cir. 2004), cert. denied, 544 U.S. 1017 (2005); *United States* v. *Trapilo*, 130 F.3d 547, 553 (2d Cir. 1997), cert. denied, 525 U.S. 812 (1998); *United States* v. *Miller*, 26 F. Supp. 2d 415, 429 (N.D.N.Y. 1998). The government's policy on the appropriateness of basing mail and wire fraud charges on tax evasion schemes, and of bringing money laundering charges based on transactions involving the proceeds of such fraud, has changed since the government filed its brief in *Smith*. Compare, *e.g.*, *United States Attorneys' Manual* § 6-4.210 (Sept. 2007) with *United States Attorneys' Manual* § 6-4.211(1) (July 1, 1992). And this Court's decision in *Pasquantino* confirms the validity of the theory of prosecution in this case. See *Pasquantino*, 544 U.S. at 354-358 (citing *Trapilo*).

charged with, *inter alia*, encouraging and inducing unauthorized aliens to reside in the United States and conspiracy to conceal, harbor, and shield those aliens (8 U.S.C. 1324(a)(1)(A)(iii) and (iv)); mail and wire fraud based upon the mailing and wiring of false tax returns (18 U.S.C. 1341 and 1343); and conspiracy to launder the proceeds of the immigration and the mail and wire fraud offenses (18 U.S.C. 1956(h)). *Khanani*, 502 F.3d at 1286. The laundered "proceeds" were identified as both the "tax" savings derived from the mail and wire fraud and the "labor cost savings" derived from the immigration offenses. *Id.* at 1296. The district court granted a post-verdict judgment of acquittal on the money laundering charge, and the court of appeals affirmed, relying largely on the district court's reasoning.

The court of appeals agreed "with the district court that 'it is clear that the term ["proceeds"] does not contemplate profits or revenue indirectly derived from labor or from the failure to remit taxes.'" *Khanani*, 502 F.3d at 1296 (quoting *United States* v. *Maali*, 358 F. Supp. 2d 1154, 1160 (M.D. Fla. 2005), aff'd *sub nom. United States* v. *Khanani*, 502 F.3d 1281 (11th Cir. 2007)) (brackets in original). The court of appeals, continuing to quote the district court, explained that, "[w]hile it is natural and clearly correct to say that the Defendants received 'proceeds' from the sale of jeans, it is, by contrast, both causally tenuous and decidedly unnatural to say that the moneys one has received from the sale of a good are, not the 'proceeds' from the sale of a good, but 'proceeds' of the labor used to produce the good." *Ibid.* (quoting *Maali*, 358 F. Supp. 2d at 1160).

Khanani and the decision below are in conflict on the question whether tax revenues unlawfully retained as the result of a mail fraud scheme qualify as "proceeds"

under the money laundering statute. Nonetheless, as the quoted excerpts from the *Khanani* opinion reveal, that issue was not the principal focus of the Eleventh Circuit's analysis in *Khanani*. Rather, its principal focus was whether "cost savings" derived from paying unauthorized aliens less than authorized workers qualify as "proceeds," particularly in light of the attenuated causal connection between the violation and the monetary gain. Because the jury's general verdict finding the defendants guilty of conspiracy to commit money laundering could have rested either on the "cost savings" theory or the unlawfully-retained-taxes theory, reversal would have been required even if the tax theory were valid, unless the error was harmless beyond a reasonable doubt. See *Yates* v. *United States*, 354 U.S. 298, 312 (1957); *Hedgepeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam). It is thus unclear how closely the court of appeals focused on the validity of the unlawfully-retained-taxes theory.

Moreover, the Eleventh Circuit in *Khanani* did not conduct its own analysis of the money laundering statute, and thus did not consider how its result could be reconciled with the statute's list of "specified unlawful activit[ies]," but instead relied almost exclusively on the reasoning of the district court. Nor did the court of appeals consider the impact of *Pasquantino* or have the benefit of the well-reasoned decision of the Third Circuit in this case. Because the Eleventh Circuit may therefore be willing to reconsider the retained-taxes component of its holding in *Khanani*, and because only two courts of appeals have squarely addressed the issue, this Court's resolution of the issue is not warranted at this time. Review at this time is particularly unwarranted because the narrow disagreement among the circuits

may be deprived of any ongoing significance by the legislation pending in Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009

REPLY BRIEF

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No. 08-981

In The
Supreme Court of the United States

FATHI Y.M. YUSUF, WALEED M. HAMED, WAHEED M. HAMED, MAHER F. YUSUF, NEJEH F. YUSUF and UNITED CORPORATION d/b/a PLAZA EXTRA,

Petitioners,

v.

UNITED STATES and GOVERNMENT OF THE VIRGIN ISLANDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

UNITED CORPORATION d/b/a PLAZA EXTRA and five members of the Yusuf family, which own and operate grocery stores in the Virgin Islands, have jointly petitioned this Court for a writ of certiorari to review a judgment and opinion of the Third Circuit.[1] The Brief in Opposition acknowledges a square conflict in the Circuits on the fundamental point of statutory construction which led the district court to dismiss numerous counts of the indictment. Nevertheless, the Solicitor General urges denial of the petition. The proffered reasons are not persuasive. The writ should be granted.

1. The respondents first suggest that certiorari be denied because the decision of the court below reversing the dismissal of the money laundering and forfeiture counts places the case in an "interlocutory . . . posture." Br.Opp. 10. This procedural fact does not deprive this Court of jurisdiction, however; it only presents a factor that may influence the Court's exercise of discretion. *See* Eugene Gressman *et al.*, *Supreme Court Practice* § 4.18, at 280-82 (9th ed. 2007). In this respect, the instant case has little in common with the precedents cited by the government. In the leading cases, all civil, the public importance of

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[1] *Rule 29.6 Statement:* The stock of United Corporation is not publicly traded. United has no parent corporation, and no publicly held company owns 10% or more of its stock.

the underlying issue was diminished, if not eliminated, by the nature of the remand that rendered the case interlocutory. See *Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-59 (1916).[2] Not so in the instant case. Moreover, to the extent that the Court's reluctance to accept cases at an interlocutory stage is related to the rule favoring avoidance of the unnecessary decision of constitutional issues, *see* Gressman *et al.*, *supra*, at 281 n.63 (citing an article by Justice Brennan), the policy carries less weight in cases presenting issues of federal statutory construction, as here.

The instant case arises in the precise posture of *Bates v. United States*, 522 U.S. 23 (1997), a case not mentioned in the Brief in Opposition. There, this Court granted certiorari to resolve a one-to-one Circuit split, in a case where the court of appeals had reversed (as here) the dismissal of a federal indictment on a point of statutory coverage. The issue presented by the defendant-petitioner there would still have been

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[2] In *Hamilton-Brown*, the issue under discussion was whether a prior denial of certiorari added any weight to the opposing party's position in a later review of the merits by this Court. Of course, the holding was that it does not. In the course of discussion, the Court explained some of the reasons why certiorari on the earlier occasion might properly have been denied, lack of finality being one of several. The Court did not address the question of when, notwithstanding its interlocutory posture, a case might be taken up on certiorari.

available to him had he been convicted after the remand for trial, and might even have been mooted by a guilty plea or acquittal on remand. Yet this Court took the case and reviewed the issue on the merits. Indeed, as in the present case, the procedural posture had the effect of sharpening the presentation of the statutory question as a pure matter of law. See also *Solorio v. United States*, 483 U.S. 435 (1987) (case heard on certiorari following reversal of dismissal of indictment for lack of subject matter jurisdiction); *Oliver v. United States*, 466 U.S. 170 (1984) (case heard on certiorari following reversal of order granting motion to suppress evidence).

Here, where the relief to which petitioners would be entitled if they prevail is a dismissal of the most serious charges in the case, and a drastic reduction in sentencing exposure, prudential considerations do not counsel awaiting the results of a potentially lengthy trial that is still in all likelihood a year away.

2. The respondents suggest that review at this juncture "would be premature . . . for an additional reason," Br.Opp. 10, to wit, that the pendency of certain legislation that might render the Circuit split a passing phenomenon. The respondents report that on April 28, 2009, a version of the "Fraud Enforcement and Recovery Act of 2009," S. 386 ("FERA") passed the Senate with a provision that would adopt as law the government's position as approved by the Court below by adding tax evasion as a prohibited objective of international money laundering. Br.Opp. 11. On May 6, 2009, however, the House passed a

different version of FERA which did *not* contain the pertinent amendment to 18 U.S.C. § 1956(a)(2). *See* 155 Cong Rec. H5260-64 (daily ed.). And on May 14, 2009, the Senate concurred in the House version, passing the bill without the international money laundering amendment, and forwarding it to the President for signature. *Id.* S5494 (daily ed.).[3]

In contrast with such other provisions of the Senate Bill as § 2(f) (creating a definition of "proceeds"), which are described as clarifying, the international money laundering amendment rejected by Congress was described in the Judiciary Committee's Report as a provision that would "make it a crime for individuals to transfer or transport money in and out of the United States to evade taxes." S.Rep. No. 111-10, 111th Cong., 1st Sess., at 9 (March 23, 2009). Not only did Congress thus choose not to expand federal

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[3] Section 2(f) of the Act does, however, adopt the view of the Court below on the issue in the instant case by adding a new definition in § 1956(c) for the term "proceeds," including "any property" that is "obtained or retained" through "some form of unlawful activity." Of course, by virtue of the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, that provision cannot apply to the instant case (or any other where the alleged criminal activity occurred prior to FERA's future effective date), nor does it shed any retroactive clarifying light on prior Congressional intent. If anything, by amending the statute, Congress supported the view that the current version of the statute is at least ambiguous, requiring strict construction. The new FERA definition also adopts the dissenters' position in *United States v. Santos*, 553 U.S. — , 128 S.Ct. 2020 (2008), with "proceeds" to be defined as "including the gross receipts of such activity."

criminal tax enforcement to cover such cases as petitioners', but it also declared the "sense of the Congress" that:

> no prosecution of an offense under section 1956 or 1957 of title 18, United States Code, should be undertaken in combination with the prosecution of any other offense, without prior approval [of one of certain specified Department of Justice Officials] if the conduct to be charged as 'specified unlawful activity' in connection with the [money laundering] offense is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses.

FERA § 2(g)(1) (final version).[4] Congress thus endorsed and echoed the concern with the "merger problem" that this Court highlighted in both the plurality and separate opinions in *Santos*. Because the conflict in the Circuits will persist for cases like the instant one even after the effective date of FERA, the respondents' second reason for denying the petition is unpersuasive.

3. The bulk of respondents' brief addresses the merits. Br.Opp. 11-18. Of course, the fact that an argument can be made on both sides of the question is not a reason for denial of certiorari. To the extent

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[4] To add teeth to this resolution, the Act requires the Attorney General to report to Congress once a year for five years on the granting and refusal of such approval.

that the respondents' contentions can be viewed as an attempt to show that the Third Circuit was clearly correct, the effort does not succeed.

a. The petition shows that the decision of the Court below is inconsistent with *United States v. Santos*, 553 U.S. — , 128 S.Ct. 2020 (2008), Pet. 10-15, and misapplies this Court's opinion in *Pasquantino v. United States*, 544 U.S. 349 (2005). Pet. 22-23. Respondents fail to refute these arguments. *Santos* holds that "proceeds" in the money laundering statutes means – at least absent contrary legislative history – the "profits" of crime, as represented by the difference between gross proceeds and expenses. The Court chose this definition, in large part, because it was more "defendant-friendly," that is, in better compliance with the rule of lenity. The respondents turn instead to dictionaries, Br.Opp. 12, and make the unrealistic claim that this Court's *Santos* ruling does not govern outside of gambling cases. Br.Opp. 15-16.

Respondents also assert that the underlying (alleged) mail fraud in this case is "entirely distinct" from the money laundering charges, Br.Opp. 17, but that claim is contradicted by the Indictment. The "Introduction" to the Third Superseding Indictment, for example, describes the alleged money laundering activity as part of "various efforts to disguise and conceal the illegal scheme and its proceeds," ¶15; all those facts are then incorporated by reference into Count 1, the alleged mail fraud conspiracy (Supers.Ind. ¶ 23, at 9), and again into the substantive fraud counts (*id.* ¶ 9, at 17). The grand jury's view of the

case thus refutes any assertion that these offenses are "entirely distinct."

Respondents find support for their construction of "proceeds obtained" as including "assets retained," as did the court below, by pointing to the inclusion as "specified unlawful activities" of two types of offenses (out of a long list) which typically generate economic advantage to the perpetrator through savings rather than through gains – bankruptcy fraud and smuggling. Br.Opp. 12-13. The respondents' argument is circular. Criminals who engineer a bankruptcy fraud (such as a "bust-out" scheme) or who organize or carry out a smuggling operation (including a "mule") may obtain "proceeds" when they are paid for their illegal services. Thus, the inclusion of such offenses in the list of "specified unlawful activities" for money laundering purposes is in no way problematic. That those who commit such crimes on their own behalf may generally only generate savings and not illegal fees or other profits, does not in any way tend to prove that such savings constitute "proceeds." It only reinforces the wisdom of this Court's focus on the "merger" issue in the *Santos* opinions.

b. The respondents' attempt to wring support out of *Pasquantino* fares no better. As noted in the Petition, an analysis of what may qualify as "property" of which a victim may be deprived by fraud, does not disclose what can constitute "proceeds" of any of a list of crimes that a defendant may receive and launder. The potential "economic equivalence" of the two,

Br.Opp. 14, does not overcome that fundamental distinction.[5]

4. The Brief in Opposition admits that there is a square conflict between the precedential opinion of the Third Circuit below and that of the Eleventh Circuit in *United States v. Khanani*, 502 F.3d 1281, 1295-97 (11th Cir. 2007). Br.Opp. 18, 19. The respondents nevertheless claim this Court's resolution of that conflict "is not warranted at this time." *Id.* Respondents disparage the Eleventh Circuit's decision on point because it adopted portions of the district court's opinion in that case as its own. Br.Opp. 20. Since the district court's opinion in *United States v. Maali*, 358 F.Supp.2d 1154 (M.D.Fla. 2005), *aff'd sub nom. Khanani*, 502 F.3d 1281, was persuasive and well-reasoned, this criticism is not worthy of response.

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[5] That the government may have changed its position over the years on the issue presented, Br.Opp. 18 n.4, hardly helps defeat the need for this Court to grant the writ. It only helps to show, at best, that there may be two defensible answers to the question presented – which is a ground to grant, not to deny the writ. And if indeed there are two possible meanings to the statutory language, then the rule of lenity would answer the question in the petitioners' favor. (Of the cases cited in that footnote, however, not one supports the decision of the court below. In *United States v. Miller*, 26 F.Supp.2d 415, 429-30 (N.D.N.Y. 1998), *aff'd*, 7 Fed.Appx. 59 (2d Cir. 2001) (summ. ord.) (non-precedential), the "proceeds" on which the court relied were from the sale of smuggled tobacco on the black market, not from "tax savings." The other two are "revenue rule" decisions, which did not address the "proceeds" question, but rather presented the rather different issue that this Court resolved in *Pasquantino*.)

Similarly, the contention that the Eleventh Circuit did not pay much attention to its own holding on tax savings as an alleged form of "proceeds," Br.Opp. 20, is undeserving of reply.

More important, the respondents' argument that the rejection of the government's "tax savings" theory was but an alternate holding (Br.Opp. 19-20) collapses when it is noted that the "other" theory in *Khanani*, "cost savings," is legally flawed for the identical reasons. That is, for present purposes, *Khanani* did not involve alternate legal rationales, but only one – the holding that is in conflict with that of the court below.

For the foregoing reasons as well as those stated in the petition, the Court should grant a writ of certiorari in this case.

CONCLUSION

For the reasons offered in this Reply and in the original Petition, the requested writ of certiorari should be granted.

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May 19, 2009